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No. ___

IN THE

Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Petitioners are federal law enforcement officers who, as a condition of employment, are required to drive specially-equipped vehicles from home to work and back to enable them to respond at any hour to emergencies in these vehicles. Petitioners are on duty during such drives and are forbidden from making personal stops or carrying non-work-related passengers. In the decision below, the Federal Circuit, applying recent Circuit precedent (but disregarding decades of practice and directly contrary administrative interpretation) held that this employer-required driving is not compensable "work" under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act of 1947.

The questions presented are:

1. Whether the term "principal activity or activities" in Section 4(a)(1) of the Portal Act embraces driving that is an integral and indispensable part of work an employee is hired to perform?

2. Whether Section 4(b)(2) of the Portal Act entitles employees to compensation for an activity treated as compensable by their employer's "custom or practice," even though they personally had not previously been compensated therefor?

LIST OF PARTIES

Petitioners are Stephen S. Adams and 6,609 individuals who are current and former employees of the United States. The names of all petitioners were filed with the Court of Federal Claims and are part of the record in the Court of Appeals for The Federal Circuit. Upon consultation with the Clerk's Office of this Court, petitioners do not list each petitioner's name. Should the Court require such information, petitioners will provide it forthwith.

The Respondent is the United States.

TABLE OF CONTENTS

QUESTION PRESENTED ..... (I)

LIST OF PARTIES ..... (II)

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

I. The Court Should Resolve Whether the "Integral And Indispensable" Standard Governs Cases in which Employers Invoke the § 4(a)(1) Exemption 13

A. The Federal Circuit Decision Conflicts Squarely And Sharply with Those of Other Federal Courts 13

B. The Federal Circuit Rule Disregards Longstanding Administrative Interpretations of the FLSA and the Portal Act 20

C. The Two-Tiered Approach to Section 4(a) Is Inconsistent With This Court's Decision in *Alvarez* .. 23

D. The Federal Circuit Rule Also Conflicts With The Court's Exposition of the FLSA's "De Minimis" Doctrine 24

E. The Issue Presented Is Of Large Practical Importance 27

II. Review Of The Federal Circuit's Construction of The "Custom or Practice" Provision Is Also Warranted 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adams v. *Hinchman*,
154 F.3d 420 (D.C. Cir. 1998), ... 7

Adams v. *United States*, ... 7

AFGE v. *OPM*,
821 F.2d 761 (D.C. Cir.1987) 21, 26

Aiken v. *City of Memphis*,
190 F.3d 753 (6th Cir. 1999) 14, 17

Anderson v. *Mount Clemens Pottery Co.*,
328 U.S. 680 (1946) 12, 24, 25, 26, 29

Baker v. *Barnard Const. Co., Inc.*,
146 F.3d 1214 (10th Cir. 1998) 9, 14, 15, 19, 27

Baker v. *GTE North Inc.*,
927 F. Supp. 1104 (N.D. Ind. 1996) 19

Barrentine v. *Arkansas-Best Freight System, Inc.*,
750 F.2d 47 (8th Cir. 1984) 18

Bobo v. *United States*,
37 Fed. Cl. 690 (1997) *3*

Bobo v. *United States*,
136 F.3d 1465 (Fed. Cir. 1998) ..... *passim*

Bonilla v. *Baker Concrete Const., Inc.*,
487 F.3d 1340 (11th Cir. 2007) 16, 18

Boudreaux v. *Banctec, Inc.*
366 F. Supp. 2d 425 (E.D. La. 2005) 27

Burton v. *Hillsborough County*,
181 Fed. Appx. 829, 2006 WL 1374493
(11th Cir. 2006) 16, 20

Christofferson v. *United States*,
64 Fed.Cl. 316 (2005) 5

Coke v. *Long Island Care at Home*,
127 S. Ct. 2339 (2007) 21

D A & S Oil Well Servicing, Inc. v. *Mitchell*,
262 F.2d 552 (10th Cir. 1958) 14

Doe v. *United States*,
372 F.3d 1347 (Fed. Cir. 2004) *Doe*, ... 6

Dole v. *Enduro Plumbing, Inc.*,
1990 WL 252270 (C.D. Cal. 1990) 17, 22, 25

Dole v. *Flint Engineering and Const. Co.*,
914 F.2d 262 (9th Cir. 1990) (table) 16, 18, 19

Dooley v. *Liberty Mut. Ins. Co.*,
307 F. Supp. 2d 234 (D. Mass. 2004) 27

Dunlop v. *E. R. Field, Inc.*,
495 F.2d 749 (1st Cir. 1974) 14, 17, 19

Dunlop v. *City Electric, Inc.*,
527 F.2d 394 (5th Cir. 1976) 16, 18, 25

Fox v. *General Tel. Co.*,
271 N.W.2d 161 (Wis. App. 1978) 17

Graham v. *City of Chicago*,
818 F. Supp. 576 (N.D. Ill.1993) 14, 17, 18, 22

IBP, Inc. v. *Alvarez*,
126 S. Ct. 514 (2005) ..... *passim*

Karr v. *City of Beaumont*,
950 F. Supp. 1317 (E.D. Tex. 1997) 14, 15, 17

Knowles v. *United States*,
29 Fed. Cl. 393 (1993) 18, 25

Levering v. *District of Columbia*,
869 F. Supp. 24 (D.D.C. 1994) 19

Lindow v. *United States*,
738 F.2d 1057 (9th Cir.1984) 25

Mitchell v. *King Packing Co.*,
350 U.S. 260 4

Mitchell v. *Mitchell Truck Line, Inc.*,
286 F. 2d 721 (5th Cir. 1961) 14, 17

NLRB v. *Rutter-Rex Mfg. Co.*,
396 U.S. 258 (1969) 30

Raper v. *Iowa*,
688 N.W.2d 29 (2004) 17

Reich v. *Brenaman Elec. Serv.*,
1997 WL 164235 (E.D. Pa. 1997) 17

Reich v. *New York City Trans. Auth.*,
45 F. 3d 646 (2d Cir. 1995) ..... *passim*

Reich v. *New York City Trans. Auth.*,
839 F. Supp. 171 (E.D.N.Y. 1993),
rev'd, 45 F. 3d 646 17

Republican Publishing Co. v. *American Newspaper Guild*, 172 F.2d 943 (1st Cir. 1949) 20

Smith v. *Aztec Well Servicing Co.*,
462 F.3d 1274 (10th Cir. 2006)] 16

Spencer v. *Auditor of Special Accounts*,
1990 WL 8034 (E.D. Ky.1990) 23

Steiner v. *Mitchell*,
350 U.S. 247, ... *passim*

United Transp. Union Local 1745 v. *Albuquerque*,
178 F.3d 1109 (10th Cir.1999) 15, 19

Vega v. *Gasper*,
36 F.3d 417 (5th Cir. 1994) 15

Wicker v. *Hoppock*,
73 U.S. 94 (1867) 30

STATUTES & LEGISLATIVE MATERIALS LAWS

5 U.S.C. § 5541 6

29 U.S.C. § 203(*o*) 24,28

29 U.S.C. § 204(f). 5

29 U.S.C. § 206 3

29 U.S.C. § 207 3

29 U.S.C. § 213(a)(16) 6

29 U.S.C. § 216 6

29 U.S.C. § 251(a)(3) 27

29 U.S.C. § 252(a) 3, 29

29 U.S.C. § 254(a). ..... *passim*

29 U.S.C. § 254(b). ..... *passim*

29 U.S.C. § 254(c) 29

29 U.S.C. § 259 27

31 U.S.C. § 1344(a)(2)(B) 7

31 U.S.C. § 1349 7

Pub. L. No. 103-329, 108 Stat. 2382 (1994) 6

Pub. L. No. 104-52, 109 Stat. 468 (1995) 6

Pub. L. 104-188, 110 Stat.1755 (1996), ... 3, 23, 24, 27

R.C.F.C. 30(b)(6) 9

H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. (1974) 26

REGULATIONS & ADMINISTRATIVE MATERIALS

5 C.F.R. § 552.401 6

5 C.F.R. § 552.122(b) 5

29 C.F.R. § 553.221(e) 22

29 C.F.R. § 785.12 23

29 C.F.R. § 785.35 ..... 5, 15,22

29 C.F.R. § 785.38 5

29 C.F.R. § 785.41 ..... 5, 18, 22

29 C.F.R. § 790.6 5

29 C.F.R. § 790.7(c) 5, 22

29 C.F.R. § 790.7(d) 5, 21

29 C.F.R. § 790.7(e) 5

29 C.F.R. § 790.7(f) 16

29 C.F.R. § 790.8(b) 21

U.S. Civil Service Commission,
Federal Personnel System Manual (FPM)
Letter No. 551-10 (April 30, 1976) ..... *passim*

U.S. Dept. Of Labor, Bur. Lab. Stats.,
American Time Use Survey Summary,
07-0930 (June 28, 2007) 27

U.S. Department of Labor, Wage and Hour Div.,
Wage and Hour Advisory Mem. No. 2006-2 at 1
(May 31, 2006) 26

U.S. Department of Labor, Wage and
Hour Div., Field Operations Handbook 23

U.S. Department of Labor, Wage and
Hour Div., Wage-Hour Op. Letter
No. 786 (Apr. 8, 1968) 19

Br. Amicus Curiae of the U.S.,
Tum v. *Barber Foods, Inc.*, No. 04-66 (2005) 25

Br. Amicus Curiae of the U.S., *IBP, Inc.* v. *Alvarez*,
No. 03-1238 (2005) 25

OPINIONS BELOW

The decision of the Federal Circuit, reported at 471 F.3d 1321, is reprinted in the Appendix ("App.") at 1a. The opinion of the Court of Federal Claims, reported at 65 Fed. Cl. 217, is reprinted at 11a. The order denying rehearing and rehearing en banc may be found at 59a.

JURISDICTION

The Court of Appeals denied rehearing and rehearing en banc on March 14, 2007. The Chief Justice extended the time to file to July 27, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 4 of the Portal-to-Portal Act ("Portal Act") provides

> (a) Activities not compensable
>
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act * * * on account of the failure of such employer * * * to pay an employee overtime compensation, for or on account of any of the following activities * * *-
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities * * * *
>
> (b) Compensability by contract or custom
>
> Notwithstanding the provisions of subsection (a) * * * the employer shall not be so relieved if such activity is

compensable by * * * *

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity * * * *

29 U.S.C. § 254.

Federal Personnel Manual System (FPM) Letter No. 551-10, entitled "Travel Time as 'Hours of Work' Under FLSA," (April 30, 1976) provides (at Table 1):

HOME TO WORK TRAVEL AS "HOURS OF WORK" UNDER FLSA

Kind of Travel Involved:	Is travel time "hours of work"?
Home to Work - Normal Situation	
Normal home to work (work to home) travel	No
Employee drives a Government vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home.	Yes[1]

* * * *

[1]All time spent driving the vehicle home to work (work to home) is hours worked.

These and the other pertinent statutory and administrative materials are reproduced in the Appendix, beginning at 61a.

STATEMENT

This case involves claims for Fair Labor Standards Act (FLSA) overtime pay by 6,610 criminal investigators employed by five federal law enforcement agencies. The court below held that under the Federal Circuit's interpretation of § 4(a)(1) of the Portal Act, see *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998), time Petitioners were required to spend driving government vehicles, for purposes deemed essential to performance of their law enforcement duties, was not compensable.

A. The Statutory Background

1. The FLSA entitles employees who fall within the Act's broad coverage provisions to be paid a minimum wage for each hour worked, 29 U.S.C. § 206, and pay at one and one-half times the regular rate for each hour of overtime work, *id.* § 207. The statute does not expressly define terms such as "work" and "workweek," see *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 518 (2005), and early judicial decisions, which interpreted those terms in ways that resulted in large and unanticipated employer liabilities, led Congress to enact the Portal Act in 1947. See *Bobo*, 37 Fed. Cl. 690, 692 n.3 (1997) (noting that decisions "expanded employer pay liability for activities such as opening windows, switching on lights, and walking to * * * work stations"), *aff'd*, 136 F.3d 1465.

Section 2 of the Portal Act, 29 U.S.C. § 252, extinguished most then-existing FLSA claims. Section 4, which governs post-enactment cases, is more narrow: it "except[s] two activities that had been treated as compensable under [prior] cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee [§ 4(a)(1)], and activities that are 'preliminary or postliminary' to that principal activity [§ 4(a)(1)]." *Alvarez*, 126 S. Ct. at 520. See *Reich* v. *New York City Trans. Auth.*, 45 F.3d 646, 649 (2d Cir. 1995) (*Reich*) (provision was "intended to relieve employers from liability for preliminaries, most of them relatively effortless, that were thought to fall outside the conventional expectations and customs of compensation").[1]

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[1] In 1996, Congress enacted the Employee Commuting Flexibility Act ("ECFA"), 110 Stat.1755, 1928, which has been codified at the end of 29 U.S.C. § 254(a). It provides:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject

Otherwise excludable preliminary activities are compensable where the employer has so treated them by contract, § 254(b)(1), or "custom or practice," *id.* § 254(b)(2).

By its terms, the Portal Act has no bearing on the compensability of activities that occur *during* work, *i.e.*, "[subsequent] to the time * * * at which [an] employee commences, or [prior] to the time * * * at which he ceases" his principal activities, see *Alvarez*, 126 S. Ct. at 520-21. And apart from the exceptions enumerated in § 4(a), the 1947 legislation "did not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek.'" *Id.* at 520.

2. The Court addressed the § 4(a) exemption in two 1956 decisions, *Steiner* v. *Mitchell*, 350 U.S. 247, and *Mitchell* v. *King Packing Co.*, 350 U.S. 260, in which employers maintained that particular pre- and post-shift activities (showering and donning and doffing protective gear by battery workers in *Steiner* and knife sharpening by butchers in *King Packing*) were excludable as "preliminary or postliminary" under § 4(a)(2). The Court held that both activities remained compensable. Canvassing the text, structure and history of the 1947 Act and Department of Labor regulations, the Court held that § 4(a) does not relieve employers of pay obligations with respect to pre- or post-shift activities that are "integral and indispensable," 350 U.S. at 255, to the work the employee is hired to perform. See *Alvarez*, 126 S. Ct at 522 (describing *Steiner* as "accepted as settled law for several decades").

3. The Court revisited Section 4(a) in *Alvarez*, where the employer claimed that time employees spent walking to production areas after putting on safety gear was excludable under § 4(a)(1). Rather than dispute that "donning" was a compensable "integral and indispensable" activity – or that traveling between "principal activities" during the workday is beyond the reach of § 4(a)(1) – the employer maintained that

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to an agreement on the part of the employer and the employee or representative of such employee.

Steiner should be read as establishing "a third category of activities – those that are 'integral and indispensable' to a 'principal activity' and thus not excluded from coverage by § 4(a)(2), but that are not themselves 'principal activities' as that term is defined by § 4(a)(1)." 126 S. Ct. at 517. The Court rejected that submission, holding that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a)," *id.* at 525, and that the continuous workday principle therefore controlled.

4. The Department of Labor has promulgated a body of rules, many of which were issued contemporaneously with the Portal Act, defining the meaning and scope of the § 4(a) exception, see 29 C.F.R. §§ 790.1-790.12, including provisions bearing on when driving to or from a worksite is "travel" excluded by § 4(a)(1) and when it is a "principal activity," see *id.* §§ 790.7(c)-(e); 785.35, 785.38 & 785.41.

5. Federal employees were brought within the FLSA in 1974, and responsibility for administering the Act in the federal sector is now assigned to the Office of Personnel Management (OPM), as successor to the U.S. Civil Service Commission (CSC). See 29 U.S.C. § 204(f). In addition to issuing regulations interpreting the FLSA, see, *e.g.*, 5 C.F.R. §§ 552.401, 552.122(b), CSC and OPM issued a series of Federal Personnel System Manual (FPM) Letters, providing detailed, government-wide instructions concerning the application of the statute.[2]

FPM Letter 551-10 (quoted *supra*, p. 2), titled "Travel Time as 'Hours of Work' Under FLSA," states, *inter alia*, that when an FLSA-covered employee drives a "[g]overnment vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home is compensable," "[a]ll time spent driving the vehicle home to work (work to home) is hours worked." *Id.* Table 1 & n.1; see

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[2] Although the Federal Personnel *Manual* was "sunsetted" at the end of 1993 and 1994, courts continue to cite and rely on FPM *Letters*. See, *e.g.*, *Christofferson* v. *United States*, 64 Fed. Cl. 316, 322 (2005).

also *id.* ("normal home to work * * * travel" is not compensable).

B. Facts and Proceedings Below

1. Petitioners, thousands of individuals employed as criminal investigators by the Bureau of Alcohol, Tobacco and Firearms, the Customs Service, the Drug Enforcement Administration, the Internal Revenue Service, and the Secret Service, are part of an even larger group of federal law enforcement officers who filed a series of suits under FLSA's collective action provision, 29 U.S.C. § 216(b), asserting that the Government had wrongly treated them as FLSA-exempt, thereby denying them pay for overtime work in accordance with that statute.[3]

2. As part of their job duties, Petitioners were assigned government vehicles, equipped with two-way radios, as well as (depending on the agency and position) firearms, ammunition, leg irons, night vision equipment, crowbars, drug testing equipment, and sirens, which they were required to have at the ready, see C.A. Br. 24-25, and they were required to complete advanced driving training, C.A. App.A120. It was undisputed

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[3] Plaintiffs had been paid under the Federal Employees Pay Act, 5 U.S.C. § 5541 *et seq.*, which calculates hours of work and awards overtime pay differently (and less generously) than does FLSA. See *Doe* v. *United States*, 372 F.3d 1347, 1360 (Fed. Cir. 2004). Consistently with controlling regulations, plaintiffs' suits sought the difference between the two amounts.

From the start, the Government's response has not been limited to the courtroom. In 1994, the Government sought – and secured – from Congress a provision (prospectively) placing federal criminal investigators outside the FLSA, 29 U.S.C. § 213(a)(16), and sought to limit plaintiffs' recovery by retroactively shortening the limitations period for administrative claims. See *Adams v. United States*, 391 F. 3d 1212, 1215 (Fed. Cir. 2004). Congress at first rejected that effort, enacting a law providing that the new limitations rule be applied only prospectively, see Pub. L. No. 103-329 § 640 (1994); the Government then sought to have *that* legislation reversed – and simply refused to process Petitioners' claims until a new, more restrictive measure was enacted, as it eventually was, Pub. L. No. 104-52. *Adams* v. *Hinchman*, 154 F.3d 420 (D.C. Cir. 1998) (addressing constitutionality of this course of events) cert. denied., 526 U.S. 1158 (1999); 391 F.3d at 1225 (addressing further constitutional issues), cert. denied, 126 S. Ct. 330 (2005).

that the vehicles are "a necessary tool whereby an Agent carries out * * * his assigned criminal investigative and protective duties and responsibilities," *id.* A119 (Secret Service).

Because Petitioners' duties require them to respond to emergency calls from home at all hours – in official vehicles – they were required, as a condition of employment, to drive the vehicles between home and work daily. Consistent with agency determinations that such driving was "essential for the safe and efficient performance of * * * [Petitioners'] intelligence, counter-intelligence protective services [and] criminal law enforcement duties," 31 U.S.C. § 1344(a)(2)(B), Petitioners were not permitted to leave the vehicles at work sites or to commute by other means.

Both federal law (31 U.S.C. § 1349) and agency policies strictly forbid the agents from making personal stops while driving these vehicles between home and work and prohibit them from carrying family members or friends as passengers. While driving, they are obliged to monitor and respond to radio calls and perform other law enforcement duties.

3. After decisions of the Court of Federal Claims, 27 Fed. Cl. 5, 28-29 (1992), and the Federal Circuit, 1998 WL 804552 (Sep. 23, 1998), holding that some plaintiffs had established their status as FLSA "non-exempt" (*i.e.*, covered) as a matter of law, see 27 Fed. Cl. at 28-29 (GS-9s and 11s had wrongly been exempted) and others were entitled to further litigate that question, see 1998 WL 804552 at *4 (reversing summary judgment on claims by GS-12 and -13s), the parties entered into settlement negotiations.

4. The first settlement agreements the Government entered into (with plaintiffs who are not Petitioners here) did not distinguish between the time spent in home-to-work driving and other unpaid hours worked. After the Federal Circuit's 1998 *Bobo* decision – which held that § 4(1) allowed the Government to require border patrol agents to board drug detection dogs at their homes and transport them to their posts and back each day,

without treating the driving as time worked – the Government took the position that Petitioners' driving likewise should be excluded from "hours worked" in settling their claims.

Three groups of plaintiffs (Petitioners here) reached partial settlement agreements with the Government, each of which reserved their rights to litigate the driving time issue.[4] The third of these, an August 2003 agreement settling claims of GS-12 employees at all five agencies, provides that "[s]olely for the purposes of litigating the plaintiffs' claims to recover for driving time, it is agreed and stipulated herein that * * * plaintiffs while employed by the agencies as GS-12[s] were FLSA non-exempt." C.A. App. 105.

5. In the Court of Federal Claims, the Government and the GS-12 Petitioners moved for summary judgment. Petitioners maintained that the Letter 551-10 rule correctly interpreted the FLSA and the Portal Act, and that the undisputed evidence – drawn mostly from the agencies' official materials and from the deposition testimony of Rule 30(b)(6) witnesses representing the Government – established that the driving is a "principal activity" to which the § 4(a)(1) exclusion does not apply.

The GS-12 officers also sought judgment based on § 4(b)(2). Citing (1) evidence that their agencies had (consistently with the rule laid down in Letter 551-10) treated time FLSA-covered employees spent driving law enforcement vehicles between home and work as compensable, and (2) the stipulation that, for purposes of the driving claims, they would be treated as non-exempt, plaintiffs urged that they were entitled to pay in accordance with "custom or practice."[5]

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[4] Another substantial subgroup, consisting of some 6,000 GS-13s, did not settle, and in 2004 prevailed on their claim that they were FLSA non-exempt. These individuals' backpay-for-driving claims are currently pending in the Court of Federal Claims.

[5] All plaintiffs opposed the Government's motions, on the ground that the Government had failed to adduce any evidence supporting the contention that Petitioners' driving was subject to the § 4(a)(1) exclusion.

The Court of Federal Claims Decision. The trial court granted summary judgment for the Government, holding that Petitioners could not prevail under the Federal Circuit's controlling interpretation of § 4(a)(1). The court described *Bobo* and *Reich* – a Second Circuit decision rejecting the Secretary of Labor's claim that police canine handlers' were performing compensable work by transporting dogs between work and home – as settling that "the mere act of driving a vehicle to and from the workplace [does] not itself constitute work," and that time spent driving is "not * * * compensable unless it involve[s] some additional burdens that [are] more than *de minimis*," App.35a. The court then concluded that the restrictions on Petitioners' driving and their additional activities during their drives were no more substantial than those held insufficient as a matter of law in *Bobo*, App.36a.[6]

The court turned aside Petitioners' contentions that they should prevail under decisions such as *Baker* v. *Barnard Const. Co., Inc.*, 146 F.3d 1214 (10th Cir. 1998), which held that driving that meets the "integral and indispensable" test is beyond the reach of the § 4(a)(1) exclusion. Those cases, the court reasoned, were "[u]nlike *Reich* and th[is] case" – because they did not arise "in a law enforcement context," App.33a; and, "[t]o the extent that the Tenth Circuit in *Baker* could be read to apply a more easily met standard for compensable travel time under FLSA than that applied by the Second Circuit in *Reich*, * * * the *Reich* analysis is controlling law in this circuit." *id.* (footnote omitted).

The trial court then addressed Letter 551-10. Acknowledging that OPM's interpretation applied directly and unambiguously to Petitioners' situation – and had been equally clearly *in*applicable in *Bobo* (which had not involved driving to facilitate emergency response), the court expressed doubt that

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[6] The court also considered whether ECFA, see n. 1, *supra*, applied to the case, concluding that it did not, because there has been no proof (or even claim) of the requisite employer-employee agreement. App.27a.

the "*Bobo* [] court would have deferred to the FPM Letter's guidance" even if it had been applicable to that case, App.52a. See *id.* 53a (asserting that following Letter 551-10 would have precipitated a "direct conflict with *Reich*" – a step "the Federal Circuit would not have lightly [taken]").[7]

The court ruled that evidence that Petitioners' agencies "followed a practice of compensating agents for home-to-work driving" did not entitle them to relief under § 4(b)(2). That provision, the court stated, authorizes relief only "for those employees who directly benefitted from that custom or practice," App.49a, and not for Petitioners, who could not show the agencies' practice "'[]ever extended to agents who were, rightly or wrongly, *classified* as exempt from the FLSA [at the time],'" *id.* 40a (quoting Def.'s Mot., emphasis original).[8]

The Federal Circuit Decision. The Court of Appeals affirmed. Quoting the language added by ECFA, which it described as stating the Portal Act's "[s]pecific [rule for] vehicular travel," App.5a, and *Bobo*'s conclusion that "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*," the court held Petitioners' claim barred under § 4(a)(1), because they performed no more "additional legally cognizable work while driving" than the *Bobo* plaintiffs and because the prohibitions on stops and carrying passengers were "basically identical to" those held *de minimis* as a matter of law in *Bobo*. App.7a.[9]

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[7] The court also referenced a page on the OPM website, observing that "OPM appears to now have adopted *Bobo* [] as the controlling interpretation of commuting time claims under FLSA." App. 56a.

[8] The opinion noted a number of issues raised by § 254(b)'s application to the federal sector, but explained that it was unnecessary to address these to decide Petitioners' claim. See App.19a-24a.

[9] The court held that *employees* bear "the burden of showing that [the disputed activity]* * * does not fall into the set of activities excluded * * * by the Portal-to-Portal Act," describing the rule cited by Petitioners – that the burden of establishing an FLSA exemption falls on the party asserting it

The Federal Circuit did not discuss Petitioners' contention that their claims (unlike the *Bobo* plaintiffs') were specifically supported by the longstanding OPM rule, but in addressing the "custom or practice" question, the opinion described Petitioners as "correct[ly]" asserting "that under * * * Letter No. 551-10, FLSA *non-exempt* officers were * * * compensated for their commute time," App.9a. The problem with the "custom or practice" claim, the court then explained, was that "[p]rior to this litigation * * * plaintiffs * * * were classified as *exempt* from FLSA and were therefore not paid for their commutes." *Id.* The stipulation that Petitioners be treated as non-exempt for purposes of the driving issue, the court reasoned, could not make up for the "reality," that "the government did not compensate the[m]" at the relevant times. *Id.*; see *id.* (under § 4(b)(2),"hypothetical customs or practice[s] do not suffice").

REASONS FOR GRANTING THE PETITION

This Court's review is warranted to resolve a broad and basic disagreement among the lower federal courts about the meaning of the Portal Act's § 4(a)(1) exception.

In cases dating back five decades, the First, Fifth, and Tenth Circuits have held (as have the Ninth and Eleventh, in non-binding decisions) that claims to the § 4(a)(1) exception are to be tested under the same standard the Court held governs under § 4(a)(2). As with other pre- and post- shift activities, these courts hold, an employee's driving is a "principal activity" – and therefore outside the Portal Act's ambit – when it is "integral and indispensable to the performance of [his] principal activities." *Steiner*, 350 U.S. at 256.

The Federal Circuit and two other Courts of Appeals (and a number of district courts) have embraced a starkly different legal rule. Instead of treating driving "done for the employer's

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– as applying to cases where the employer claims the worker is exempt from *coverage*, but not to assertions that certain "*activities* [are exempted] from the FLSA," App.6a (emphasis original).

benefit [and] under the employer's rules," as beyond the reach of § 4(a)(1), these decisions hold it "*non*compensable" – unless the employee performs substantial "labor *beyond* * * * driving the vehicle" App.9a (emphasis added).

The gulf between these legal standards is as broad in practice as it is on paper. Not only have factually identical cases yielded opposite results, but legally compelling claims, like this one, have fared worse under the Federal Circuit rule than have cases elsewhere with less one-sided facts.

The question on which these courts are divided is especially worthy of the Court's resolution because it arises in an area of the law where the Court (and Congress) have long recognized unpredictability to be particularly undesirable; because it concerns a subject of broad and increasing practical importance; and because the sharp divergence between the Federal Circuit's interpretation of the FLSA and that governing elsewhere leaves federal workers in a very different (substantially worse) position than counterparts doing the exact same work in private (or nonfederal) employment.

Review is further warranted because the construction of § 4(a)(1) applied by the Federal Circuit is seriously mistaken. Both this Court's decision in *Alvarez* and longstanding administrative interpretations establish that "integral and indispensable" driving is a compensable "principal activity" -- and neither the language of ECFA (cited by the court below) nor dictum in the *Steiner* opinion (cited by other courts) supports the Federal Circuit's contrary rule.

The Federal Circuit's decision is also irreconcilable with another of this Court's important precedents, *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), on a point of large legal and practical significance. The expansive version of the "*de minimis*" doctrine invoked below – whereby courts are permitted to pronounce judgments (as a matter of law) about the nature of the requirements employers impose and to do so activity-by-activity – bears no resemblance to the limited,

quantitative inquiry approved in *Anderson*, and conflicts with other courts' and the Labor Department's understanding of the *de minimis* rule.

The Court should also review the Federal Circuit's unprecedented and fundamentally mistaken construction of § 4(b)(2). The question here is not whether a "hypothetical" practice suffices under that provision, but whether employees who establish their employer's *actual* practice of treating an activity as "time worked" when paying FLSA-*covered* employees should be denied payment for the same activity because the employer wrongly classified them as FLSA-exempt. Although Congress intended the § 4(b)(2) custom or practice provision to have limited application, the requirement added by the decision below – that the employer must previously have paid the *particular* employee for the activity at issue – is without support in statute or common sense.

I. The Court Should Resolve Whether the "Integral And Indispensable" Standard Governs Cases in which Employers Invoke the § 4(a)(1) Exemption

A. The Federal Circuit Decision Conflicts Squarely And Sharply with Those of Other Federal Courts

In concluding that Petitioners' employer could – without paying them – compel them to drive government vehicles, to facilitate performance of job duties from home, and direct and control their activities during the drive, the decision below rejected Petitioners' arguments that *Steiner* should control, *i.e.*, that § 4(a) does not affect compensation for "integral and indispensable" activities – and that the driving in this case so qualified. The decision instead applied Circuit precedent establishing a special rule for cases where the § 4(a)(1) exception is invoked: that employer-required driving "done for the employer's benefit, under the employer's rules, is *non*compensable" – unless the employee "perform[s] additional legally cognizable work while driving to the[] workplace." App.9a; see also *Bobo*, 136 F.3d at 1467 (employees had no

FLSA claim where "the restrictions placed upon the INS Agents' commutes are compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities," because these "burdens" did not pass the "*de minimis* threshold").

The Federal Circuit is not alone in this two-tiered approach to Section 4(a). The Sixth Circuit has likewise adopted a special, unforgiving standard in a case involving employer-required driving between home and work, see *Aiken* v. *City of Memphis* 190 F.3d 753, 758 (6th Cir. 1999), and both that decision and *Bobo* (and a number of federal district court decisions) have claimed reliance on the Second Circuit's influential decision in *Reich*. See App.31a-34a (collecting cases holding canine transportation to be excluded under § 4(a)(1)); but see *Graham* v. *City of Chicago*, 818 F. Supp. 576 (N.D. Ill.1993) (granting judgment *for* canine handlers on FLSA claim to compensation for transporting dogs); *Karr* v. *City of Beaumont*, 950 F. Supp. 1317 (E.D. Tex. 1997) (same).

This rule, however, conflicts sharply with the legal standard that other Circuits apply to employer assertions that § 4(a)(1) renders driving to or from work non-compensable. In a case decided two years after *Steiner*, *D A & S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552 (10th Cir. 1958), the Tenth Circuit held, in a suit brought by the Secretary of Labor, that the time workers spent driving their employer's trucks to and from a job site was not within the § 4(a)(1) exclusion, applying the same "integral and indispensable" standard *Steiner* had held to govern under § 4(a)(2), *id.* at 554-55.

Precedent-setting decisions of the First and Fifth Circuits adopted the same rule. See *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F. 2d 721 (5th Cir. 1961) (concluding that driving and other pre- and post-shift "activities were * * * such an integral part and so indispensable to the employees' main job as to be outside of the Portal-to-Portal exemption"); *Dunlop* v. *E. R. Field, Inc.*, 495 F.2d 749 (1st Cir. 1974) (holding that driving

employer's trucks to and from work site was outside the § 4(a)(1) exclusion, citing *D A & S* and a factual finding that the driving was "'an integral and indispensable function of the defendant business'").

Recent decisions have adhered to and amplified this approach. Thus, in *Baker*, the Tenth Circuit reversed a verdict for an employer who asserted that § 4(a)(1) relieved it of the obligation to pay employees for time spent driving trucks home from work each day. See 146 F.3d at 1216. "Because travel time meeting the 'integral and indispensable' test must be compensated pursuant to the FLSA," the court held, the dispositive question was whether work-to-home driving met that test – and was not "[n]ormal travel from home to work," *id.* at 1218 (quoting 29 C.F.R. § 785.35). *Baker* then identified the considerations that should decide that question:

> whether Plaintiffs were truly free to go where they wanted at the end of the work day and to use whatever method of transportation they chose * * * * whether Plaintiffs could have left the rigs at the work site * * * or whether Plaintiffs were required, by policy or practical reality, to transport the rigs from the work site each day to refuel and restock.

Id. at 1219.[10]

And in *United Transp. Union Local 1745* v. *Albuquerque*, 178 F.3d 1109 (10th Cir. 1999), the court applied the standard to plaintiffs' claim that time spent riding their employer's shuttle buses was compensable work. Time spent riding to and from "split shifts," the court held, was outside § 4(a)(1), because it was "integral and indispensable to [the employer's] system of dispatching and relieving drivers," but riding after the last shift was not compensable work, because the employees were free to "go home any way they choose, by any means they

[10] See Civ. No. 93-140 (D. N.M. Nov. 18, 1998) at 18-19 (Unpublished Opinion) (holding, on remand, that the work-to-home driving was compensable "because it [was] integral and indispensable to [the] principal activities for which they were hired").

choose." 178 F.3d at 1120. See also *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) ("Travel that is an indispensable part of performing one's job is a principal activity and is compensable"); *Karr*, 950 F. Supp. at 1323 (holding, under Fifth Circuit law, that plaintiffs' transportation of police dogs was "[a]n integral and indispensable part of [their] work" and outside § 4(a)(1)).[11]

The law in the Eleventh Circuit appears to be the same. In a recent, closely reasoned (though not precedential) decision, *Burton* v. *Hillsborough County*, 181 Fed. Appx. 829 (11th Cir. 2006), that court stated the rule for FLSA claims for time spent on pre- and post-shift driving: "where the activity is 'an integral and indispensable part of the principal activities for which [the employees] are employed,' the Portal-to-Portal exemption [§ 4(a)(1)] does not apply." *Id.* at 837 (quoting *Steiner*, 350 U.S. at 256, and *Dunlop* v. *City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976)). The Eleventh Circuit affirmed summary judgment for plaintiffs, emphasizing that "without the county vehicles the employees could not perform the principal activities for which they were employed" and that the requirement that they drive the vehicles to secure parking sites at the end of their shift "solely benefitted the [employer]," which "did not want its vehicles left at unattended work sites overnight." *Id.* Cf. *Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 & n.7 (11th Cir. 2007) (distinguishing *Burton* on its facts).[12]

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[11] *Vega* rejected compensation under the integral and indispensable test, because the workers "were *not* required to use [the employer's] buses to get to work in the morning," 36 F.3d at 425, and "performed no work prior to or while riding" them, *id.*, and in light of a Labor Department rule specifically on point, *id.* at 424 (citing 29 C.F.R. § 790.7(f)). *Smith* v. *Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006), is to similar effect: the decision recognized that "traveling * * * constitute[s] 'work' if it is 'an integral and indispensable part of the principal activities for which [plaintiff] [is] employed,'" but held the driving at issue did not qualify, because employees were free to choose their means of traveling to the work site and "free to spend [the drive] time as they wished," *id.* at 1281.

[12] *Bonilla* is somewhat opaque: although the decision only undertook a full

Accord *Dole* v. *Flint Engineering & Const. Co.*, 914 F.2d 262 (9th Cir. 1990) (table) (applying "integral and indispensable" test, holding that § 4(a)(1) did not relieve employer of obligation to compensate workers for driving trucks home).

State court FLSA decisions have similarly treated "integral and indispensable" driving as an "exception[] to the general rule that drive time is non-compensable," *Raper* v. *Iowa*, 688 N.W.2d 29, 46 (2004); see also *Fox* v. *General Tel. Co.*, 271 N.W.2d 161 (Wis. App. 1978), as have a number of influential district court decisions rendered – like *Steiner*, *Field*, *Mitchell Truck Line* and *Reich* – in enforcement actions brought by the Secretary of Labor, see, *e.g.*, *Dole* v. *Enduro Plumbing, Inc.*, 1990 WL 252270 (C.D. Cal. 1990); *Reich* v. *Brenaman Elec. Serv.*, 1997 WL 164235 (E.D. Pa. 1997).

These sharply divergent legal standards are outcome-determinative. As noted, whereas *Bobo* and other courts have held that, under § 4(a)(1), canine officers' transporting dogs between work and home – even when required by the employer, in special vehicles, and subject to restrictions – does not raise a "valid or even triable claim to compensation under the FLSA," 136 F.3d at 1468, courts adhering to the *Steiner* test have ruled, on identical facts, that *employees* are entitled to judgment as a matter of law. See *Karr*; *Graham*; see also *Reich*, 839 F. Supp. 171 (E.D.N.Y. 1993), *rev'd* 45 F. 3d 646.[13]

"integral and indispensable" analysis with respect to activities claimed to be exempt under § 4(a)(2) – concluding that plaintiffs' bus riding fell squarely within § 4(a)(1) and 29 C.F.R. § 790.7(f) – it elsewhere stated that "boarding * * * buses," would be compensable if it amounted to "work-related activity that is 'integral and indispensable,'" and described the *Burton* decision as having applied "the same 'integral and indispensable' analysis that is at issue here," *id.* at 1342, 1345 n.7.

[13] Although the *Bobo* and *Aiken* courts treated their cases as on all fours with *Reich*, that case did not involve restrictions during the drive, and the Second Circuit decision can be read as attaching substantial significance to another distinguishing fact – that the employer, though mandating the canines be transported by car, did not *require* the employees to do the driving. See 45 F.3d at 648 n.2; *id.* at 650.

Likewise, there can be no real argument that the facts summarized in the decision below would entitle Petitioners to judgment as a matter of law under any of the various formulations of the "integral and indispensable" test:

> The plaintiffs are issued government-owned police vehicles and required as a condition of their employment to commute from home to work in those vehicles. This requirement facilitates their employers' law enforcement missions, since the cars will be available to the officers for rapid response to emergency calls at any time, whether the officers are at home or proceeding on their commutes. The officers' time is not entirely their own during their commutes: they are required to have their weapons and other law enforcement-related equipment and to have on and monitor their vehicles' communication equipment. They are not allowed to run any personal errands in their government vehicles, so their commute must proceed directly from home to work and back again without unauthorized detours or stops.

App.2a. This does not describe an activity "undertaken 'for [employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.'" *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) (quoting *Dunlop.*, 527 F.2d at 398); *Bonilla*, 487 F.3d at 1344 (identifying "(1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer" as determinative factors).

Indeed, Petitioners' driving falls more readily into the "principal activity" category than activities other Circuits have held compensable, notwithstanding § 4(a)(1). First, this case involves driving – rather than merely "riding" – see *Knowles* v. *United States*, 29 Fed. Cl. 393 (1993) (emphasizing "the difference between traveling and driving"); see *infra*

(discussing 29 C.F.R. § 785.41).[14] Second, Petitioners' driving is compulsory, see *Flint*, 1990 WL 134281, *3 (contrasting case of employees "*required* to drive the company trucks to their homes" with that of one permitted to "'drive a truck to and from his home *for his own convenience*'") (quoting Wage-Hour Op. Ltr. No. 786 (Apr. 8, 1968)) (emphasis added by Ninth Circuit); cf. *Field*, 495 F.2d at 751 (upholding compensation for employee who could "have reached the jobsite by personal transportation" – because he "was in fact performing services for the benefit of the employer" by driving the employer's truck). The requirement here is not merely a "practical reality," *Baker*, 146 F.3d at 1219, see also *Flint*, 1990 WL 134281, *3 (employer's policies "amounted * * * in practice to a requirement" that workers drive trucks home); it is a formal, binding condition of Petitioners' employment.

In Petitioners' case, transporting the vehicles *home* was specifically necessary and required so that Petitioners could perform *further* job duties – *i.e.*, emergency response in the official law enforcement vehicle – there. Compare *Baker* v. *GTE North Inc.*, 927 F. Supp. 1104, 1113 (*GTE*) (N.D. Ind. 1996) (ruling for employees, but noting that "parking the vehicles at home" was for the "employees' convenience"), rev'd on other grounds, 110 F.3d 28 (7th Cir.1997). Petitioners in this case, like Bobo – but unlike the prevailing employees in *Flint* or *UTU* – have job responsibilities during the drive, and the restrictions on their stopping and on carrying "civilian" passengers have no analog in those decisions. Cf. *Levering* v. *District of Columbia*, 869 F. Supp. 24, 29 (D.D.C. 1994) (employees who are "required to drive * * * without making personal stops * * * [have] str[onger] claim for compensation"). Still other factors that have been considered in deciding whether driving is "integral and indispensable" are also present

[14] Notably, none of the decisions that prompted enactment of the Portal Act involved required driving – or driving of any kind. See *Graham*, 828 F. Supp. at 582 ("time spent transporting police canines is more than merely 'riding' to work, which is excluded by the Portal to Portal Act").

here: Petitioners' driving is not treated as a benefit by the I.R.S., C.A. App. 269-70, and they are considered in the line of duty for purposes of workers compensation and death benefits, *id.* See *GTE*, 927 F. Supp. at 1115, 1119 (citing similar evidence as "further support[ing] the conclusion that [plaintiffs were]'working' under the FLSA and Portal Act").

The lone factual distinction that might appear to belong on the other side of the ledger – the benefit of departing directly from (and arriving) home – is itself complicated by the employer requirement that Petitioners proceed without stopping and unaccompanied. Decisions like *Burton* have rightly taken account of the inconvenience of switching cars at an employer-designated lot, but it is not convenient for an employee needing to pick up his child or do personal business to be required to drive the official vehicle home and switch cars there. Of course, even a significant, direct benefit to the employee does not make an activity noncompensable under the FLSA (or the Portal Act): the decisions in *Alvarez* and *Steiner* surely did not depend on any finding that donning protective gear was not beneficial to the employees. Cf. *Republican Publishing Co.* v. *American Newspaper Guild*, 172 F.2d 943, 945 (1st Cir. 1949) (theater reviewer is doing compensable work under FLSA when attending performance).

B. The Federal Circuit Rule Is Irreconcilable With Administrative Interpretations of the FLSA and the Portal Act

The Federal Circuit made no effort to reconcile its construction of § 4(a)(1) with those of OPM and the Labor Department. This silence is initially remarkable because FPM Letter 551-10 – the official, government-wide interpretation of the FLSA that was in effect (and adhered to by federal agencies) at all times relevant to this case – speaks to this precise situation, stating unambiguously that time spent driving a law enforcement vehicle between work and home *is* compensable under the FLSA when pursuant to "a requirement of the

employing agency[] to respond to emergency calls immediately from home." See p.2, *supra*.[15]

But whether or not the courts below accorded Letter 551-10 sufficient respect, the distinction drawn in that rule (and disregarded below) – between normal-home-to-work driving and that required by an employer, for the employer's purposes – is thoroughly consistent with the Labor Department's longstanding interpretations of the Portal Act, the legal significance of which is beyond dispute. See *AFGE* v. *OPM*, 821 F.2d 761, 770-71 (D.C. Cir.1987) (federal sector FLSA rules must cohere with those promulgated by the Labor Department); see *Alvarez*, 126 S. Ct. at 521; cf. *Coke* v. *Long Island Care at Home*, 127 S. Ct. 2339 (2007).

These rules, some in place since shortly after the Portal Act's enactment, not only provide for a unitary standard for both subsections of § 4(a) – "[t]he term 'principal activities' includes *all* activities which are an integral part of a principal activity," 29 C.F.R. § 790.8(b) (emphasis added) – but they stand against the central premise of the Federal Circuit's rule: that, even when required by the employer for its benefit, the "mere act of driving" is not "cognizable work," App.5a.

These rules plainly state that travel "outside [an employee's] regular working hours at the direction and on the business of his employer * * * [is] not ordinarily" within the ambit of § 4(a)(1), § 790.7(d); that traveling which "is not segregable from the

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[15]The trial court opinion did address Letter 551-10, but did so in a highly problematic way. First, the court hypothesized that the Federal Circuit might not have followed the OPM interpretation if it had been in issue in *Bobo* – though conceding it had no application on the facts of that case. App.52a. The court then pointed to material on the OPM website, App.55a, but even if the cited webpage could be read as more than just the agency's recognition of *Bobo* as the law of the Federal Circuit (where federal sector FLSA cases usually are adjudicated), it does not explicitly disavow (or even necessarily contradict) Letter 551-10 – nor does it indicate an intention that any new rule be applied retrospectively, to claims for work performed when Letter 551-10 was, indisputably, the definitive OPM interpretation.

simultaneous performance of * * * assigned work" is also unaffected by § 4(a)(1), *id* § 790.7(c), and that:

> Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. *An employee who drives a truck, bus, automobile, boat or airplane*, or an employee who is required to ride therein as an assistant or helper, *is working while riding.*

Id. § 785.41 (emphasis added). Compare *id.* § 553.221(e) (police officer "given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls").

These regulations and judicial decisions applying them distinguish between an employee's driving to "get [himself] to work" – *i.e.*, commuting – and his driving the employer's equipment, including its vehicles, to or from a worksite, *i.e.*, "transporting." The former is a noncompensable "incident of employment," 29 C.F.R. § 785.35, while

> [t]ravel time itself is compensable when work is performed while traveling, such as in this case where * * * workers * * * are responsible for picking up and transporting a truck to the jobsite, not for the sole purpose of transporting only himself alone but also for the purpose of transporting * * * the truck (where getting the truck itself to the jobsite is one purpose of the trip * * * because of [its] being specially-equipped to aid at the jobsite in the performance of jobsite work).

Enduro Plumbing, 1990 WL 252270, *6.

Petitioners' entitlement to compensation draws strength from yet another central Portal Act principle – that travel between work activities – "all in the day's work" – is compensable. See *Alvarez*, 126 S. Ct. at 524 (citing 29 C.F.R. § 790.7(c)). The driving at issue here (and in the canine handler cases) is not simply for transportation purposes. The vehicles and equipment are required at Petitioners' homes to enable them to fulfill *work*

responsibilities there. See *Graham*, 828 F. Supp. at 582 n.4 ("the officer's homes are actually work sites because a part of their principal activity * * * takes place there"); cf. 29 C.F.R. § 785.12 (regulations pertaining to time worked apply "to work performed * * * at home").

Indeed, the incompatibility of the Federal Circuit's rule with the Labor Department's construction of the statute does not require extrapolation from cold regulatory text. Not only was *Reich* an enforcement action brought by the Secretary of Labor – as were numerous other cases finding driving a "principal activity" under the *Steiner* test, see *supra*, but the Department's current Field Operations Handbook contains a rule (albeit addressing ambulances, rather than law enforcement vehicles) that is strikingly similar to the one in Letter 551-10:

> In the ordinary case where an employer permits an employee to drive an ambulance to and from his home for the employee's own convenience, the time so spent is not hours worked. If the employee is required to take the ambulance home in order to respond to calls immediately, all the time spent in driving would be hours worked.

Wage and Hour Div., F.O.H. § 31d00(a)(5) (citation omitted).

C. The Two-Tiered Approach to Section 4(a) Is Inconsistent With This Court's Decision in *Alvarez*

Decisions extending the § 4(a)(1) exception to driving that would qualify as a compensable "principal activity" under the ordinary "integral and indispensable" test have advanced different grounds for doing so. Some, like the one below, have pointed to ECFA; others have suggested that language in *Steiner*, or the statute itself, supports a two-tier rule. See, *e.g.*, *Spencer* v. *Auditor of Special Accounts*, 1990 WL 8034 *4 (E.D. Ky. 1990) ("the exception for 'integral and indispensable' activities is applicable only to § 254(a)(2), not § 254(a)(1)") (citing *Steiner*). See also App.33a (suggesting that special § 4(a)(1) standards apply in the "law enforcement context").

None of these is tenable. As the Government acknowledged

below, see C.A. Rehear. Opp. 5, the Federal Circuit simply erred in treating the language added by ECFA as supplying a global rule for "vehicular travel" under the FLSA. As the trial court held, this provision, whose plain terms direct that courts not apply FLSA to override "agreement[s]" relating to employees' use of employer-owned vehicles, has no application here, where no such agreement was claimed, let alone established. See App.27a. Indeed, the import of that legislation to this case is in precisely the opposite direction: as confirmation that (absent agreement) the FLSA *does* require compensation in some driving cases. Cf. *Steiner*, 350 U.S. at 255 (treating enactment of § 203(*o*) as evidence of Congress's understanding that some clothes changing was compensable).

To the extent that language in the *Steiner* opinion might be read as supporting a dual regime – where "integral and indispensable" "preliminary" activities are beyond the reach of 4(a), but "integral and indispensable" "travel" is not, that understanding could not survive *Alvarez*. Thus, while *Steiner* (a case where §4(a)(1) was not in issue) at one point states, somewhat enigmatically, that pre- and post-shift activities are compensable if they are "an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)," 350 U.S. at 256, *Alvarez* unambiguously settled that the integral and indispensable test is a gloss on "principal activity or activities" – a term that appears in *both* subsections – and that "[t]here is no plausible argument that these terms mean different things in § 4(a)(2) and in § 4(a)(1)," 126 S. Ct. at 523.

D. The Federal Circuit Rule Also Conflicts with the Court's Exposition of the FLSA's "*De Minimis*" Doctrine

Although the defining error of the Federal Circuit rule is its premise that employer-required driving cannot be "cognizable work," the court's construction of the FLSA breaks with controlling law in another significant respect. In *Bobo*, the

court, after narrowing its inquiry to activities and burdens "beyond" the driving itself, then invoked the "*de minimis*" rule announced in *Anderson* – that the FLSA, like the law generally, does not concern itself with "trifles," so claims "concern[ing] only a few seconds or minutes of work," 328 U.S. at 692 – to conclude, as a matter of law, that none of the employer-imposed restrictions and requirements sufficed to entitle plaintiffs to compensation. Thus, after deciding that the restrictions on plaintiffs' driving did not "make this time compensable," the court concluded that the other "burdens, such as the need to make [dog-care] stops * * * and the requirement to sign on to the radio, d[id] not pass the *de minimis* threshold either," 136 F.3d at 1468. The panel below relied on *Bobo*'s reasoning to deem Petitioners' responsibilities "*de minimis*" as a matter of law. App.8a.

This version of the *de minimis* rule is fundamentally at odds with *Anderson* itself and with other federal courts' understanding of the doctrine (and Department of Labor's). As these authorities make plain, *Anderson*'s domain is narrow – permitting courts to decide that the quantity of *time* an activity consumes is so small that it may be disregarded; see 328 U.S. at 692 (rule weeds out "split-second absurdities"); see *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir.1984); it supplies no authority – or standard – for determining the legal significance of employer restrictions, such as the prohibition on making stops and carrying passengers, see *Knowles*, 29 Fed. Cl. at 395 n.3 ("The question there is whether the *amount* of time spent is so short as to not require compensation * * * * The question whether the character of the activity is work is a different one") (emphasis original); *Enduro Plumbing*, 1990 WL 252270, *6 ("the *de minimis* doctrine * * * become[s] an issue only after it is first determined that the time is compensable in character").

But even if the "*de minimis*" rule could be transplanted to make these very different kind of determinations, settled law

establishes the error of the Federal Circuit's approach. As the Fifth Circuit held, a court should ask whether "activities combined still [involve] so slight an expenditure of the employees' time as to be *de minimis*," *Dunlop*, 527 F.2d at 401, not consider each activity (or restriction) separately, as the *Bobo* version does. As the Labor Department explained in amicus briefs in *Alvarez* and *Tum*, an "activity-by-activity approach" to the *de minimis* rule "thwart[s] the purposes of the FLSA," because "almost any activity can be broken down into constituent parts that could be conceptualized as individual [noncompensable] activities." U.S. Amicus Br. No. 04-66 at 26-27; *id.* (*de minimis* "rule does not apply separately to each particular activity viewed in isolation" but "instead requires consideration of the aggregate amount of time for which the employee seeks compensation"); accord U.S. Amicus Br., No. 03-1238 at 28. See also Dept. of Labor, Wage and Hour Div., Wage and Hour Advisory Mem. No. 2006-2 at 3 (May 31, 2006) (such matters are not appropriately resolved "'as a matter of law'").

The Federal Circuit rule depends on an untenable revision of *Anderson*'s *de minimis* rule. As framed by this Court and applied by courts other than the Federal Circuit, that rule is a straightforward, judicially manageable quantitative test; the Federal Circuit has transformed it into a qualitative (and highly subjective) judgment turning on the perceived laboriousness of components of work – a judgment reached casually, as a matter of law, unmoored to any evidentiary or substantive standards. The doctrine cannot coexist with FLSA if work is broken into component parts and considered separately, as the court did here. And the cumulative effect of the court's revision of *Anderson* is striking: no working person, previously free to get to and from work as he pleased, who was abruptly required by his employer to drive the employer's vehicle every day, placed on-duty during the drive, and forbidden from carrying passengers or making any personal stops, would possibly consider the imposition to be a "trifle[]," 328 U.S. at 692.

E. The Issue Presented Is Of Large Practical Importance

This Court's review is especially warranted in this case because the issue that has divided the federal courts arises in a statutory regime in which certainty and predictability are recognized to be of great importance – to employers and employees alike, see 29 U.S.C. § 251(a)(3); *id.* § 259(a), and because the state of the law – in which the Federal Circuit applies a narrow (and erroneous) view of the FLSA in federal sector employment, while other Courts of Appeals (and the Labor Department) apply a less restrictive (correct) rule of law to the other employees' substantively identical claims – is precisely what Congress intended should *not* happen. See H.R. Rep. 93-913, 93rd Cong., 2d Sess. (1974) 28; *AFGE*, 821 F.2d at 770-71.[16]

The specific issues the case raises are also of large and continuing practical importance. Multiple cases, involving thousands of individual claims raising this precise issue, are pending in the lower courts, see n.4, *supra*, and new cases factually similar to *Bobo* and *Baker* continue to be filed. Moreover, rights and liabilities related to driving between "home" and "work" are taking on greater salience as more workers are able (and, increasingly, required by their employer) to perform work duties at home, see, *e.g.*, *Boudreaux* v. *Banctec, Inc.*, 366 F. Supp. 2d 425 (E.D. La. 2005); *Dooley* v. *Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234 (D. Mass. 2004); U.S. Dept. Of Labor, Bur. Lab. Stats., *American Time Use Survey Summary*, 07-0930 (June 28, 2007) (in 2006, "21 percent of employed persons did some or all of their work at home"), and as more employers and employees consider entering agreements of the sort provided for under ECFA.

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[16]Although Congress expected there to be instances when the FLSA would need to be adapted to circumstances unique to federal employment, that principle is in no way implicated here. Whatever OPM's present views, it plainly saw nothing unique to federal employment to prevent it from adhering to the 551-10 rule for decades (including all the time for which Petitioners seek backpay).

Finally, this case is not only a highly appropriate vehicle for resolving the Circuit conflict – it presents the issue squarely and on largely undisputed facts – it is also one where the direct consequences of permitting an erroneous lower court rule to stand are unusually serious: the Federal Circuit decision in this case wrongly extinguished claims that the more than 6,000 individual law enforcement officers now before the Court have labored to vindicate – in the face of determined (and constitutionally extraordinary, see n.3, *supra*) Government opposition – for nearly two decades.

II. Review Of The Federal Circuit's Construction of The "Custom or Practice" Provision Is Also Warranted

Before the courts below, the GS-12 Petitioners sought judgment on the alternative ground that § 4(b)(2), which provides that the § 4(a) exclusion has no application to preliminary activities that an employer has treated compensable "by custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed."

The circuit court held that Petitioners' unrefuted evidence that their agencies *did* at relevant times (and consistently with Letter 551-10) pay FLSA-covered employees for driving official vehicles when such driving was mandated, to facilitate emergency response, was insufficient – absent proof that Petitioners *themselves* had been paid for that activity. The court then held this further requirement could not be met by defendants' binding stipulation that, for purposes of deciding this issue, the GS-12s would be treated as FLSA-non-exempt. To allow recovery on this basis, the court stated, would be to "rewrite history," App.9a.

Although Petitioners can prevail here without the Court's reaching the issue – and disputes concerning § 4(b)(2) arise far less frequently than ones involving § 4(a) – the "custom or practice" concept operates in FLSA provisions other than Section 4, see 29 U.S.C. § 252(a); *id.* § 203(*o*), and the Federal

Circuit's construction of this term was so seriously flawed as to also warrant this Court's review.

First, there is no textual basis for the requirement that the worker himself have been compensated. The language of § 4(b) focuses on whether *the employer* has treated *the activity* as compensable – not whether the employee has been paid. Although the statutory text makes clear that Congress did not intend "custom or practice" to sweep broadly, Congress effectuated its intent by enacting provisions expressly limiting "customs" to those followed by (1) the particular employer; (2) at the particular "establishment"; and performed (3) at the same time of day, 29 U.S.C. § 254(c). Conspicuously absent from the statute, however, is the "requirement" the courts below held unmet: that the plaintiff employees personally have been paid.

Any such restriction would render the provision almost entirely superfluous – workers who are already receiving compensation are not the ones in need of statutory protection – and irrational: workers performing precisely the same activity at the same establishment at the same time would have different rights (depending on when and whether they had received a paycheck for the activity).[17] Worse still, employers who did not comply with the FLSA would fare better than those which actually paid non-exempt workers according to its provisions. Compare *Anderson*, 328 U.S. at 687 (construing statute to avoid allowing employer "to keep the benefits of an employee's labors without paying due compensation").

To the extent the custom provision contemplates *some* element of similar-situatedness between plaintiff and those customarily paid, any such (implied) limitation has no application here. Petitioners' activity is the same as the one performed by those customarily compensated – the *employer's* reasons for treating the activity as compensable (the fact that

[17]The provision would not be entirely superfluous because there could be instances where an employer abruptly stops paying, but where a court would hold the custom to have still been "in effect."

driving was mandatory, so that vehicles would be in place for emergency response), apply fully and identically to Petitioners. In fact, the employer's customary criterion for exclusion *also* supports Petitioners. The agencies did not purport to draw the compensation line based on whether particular employees' driving was especially "essential," but rather based on their status under FLSA; under Letter 551-10, *all* non-exempt workers whose driving meets the specified conditions are to be compensated. Once it is judicially determined – or, as here, conceded by binding stipulation – that Petitioners were non-exempt, the employer's erroneous (unlawful) classification decision can be no bar to their FLSA right to receive backpay according to the practice in effect at their work establishment.

Indeed, the concerns invoked by the Federal Circuit about "rewrit[ing] history" and "hypothetical" customs are oddly out of place here. There was nothing "hypothetical" about the practice – it is substantially undisputed. Similarly, what the decision disparaged as "rewrit[ing] history" is an attribute inherent in the process of adjudication – which seeks to place the aggrieved party "as near as may be, in the situation he would have occupied if the wrong had not been committed.'" *Wicker* v. *Hoppock*, 73 U.S. 94, 99 (1867); *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (remedies aim to "restor[e] the economic status quo that would have obtained but for the company's wrongful [act]").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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JULY 2007

APPENDIX

United States Court of Appeals,Federal Circuit.

Stephen S. ADAMS, et al., Plaintiffs-Appellants,

v.

UNITED STATES, Defendant-Appellee.

Nos. 2006-5040, 2006-5041.

Dec. 18, 2006.

Before LOURIE, SCHALL, and GAJARSA, Circuit Judges.

GAJARSA, Circuit Judge.

The plaintiffs-appellants ("plaintiffs") in this case are several thousand federal law enforcement officers who seek compensation from the government for the time they spend commuting to and from work in government-owned police vehicles. The United States Court of Federal Claims issued summary judgment in favor of the government, holding that the driving time was not compensable under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, as amended by the Portal-to-Portal Act, 29 U.S.C. §§ 251-262. We affirm.

I. BACKGROUND

This case is the last piece of a larger employment dispute between the government and law enforcement officers with the United States Secret Service; United States Customs and Border Protection (formerly United States Customs Service); the Internal Revenue Service; the Bureau of Alcohol, Tobacco, and Firearms; and the Drug Enforcement Agency. We have ruled once before on an unrelated issue in the same case. *Adams v. United States*, 391 F.3d 1212 (Fed. Cir.2004). Most of the issues have settled, with the government agreeing to make a cash payment to the plaintiffs and to consider them non-exempt employees under FLSA. However, the settlement agreements left open for litigation the question posed by this appeal: whether the plaintiffs' commutes constitute compensable work under FLSA.

The basic facts are undisputed. The plaintiffs are issued

government-owned police vehicles and required as a condition of their employment to commute from home to work in those vehicles. This requirement facilitates their employers' law enforcement missions, since the cars will be available to the officers for rapid response to emergency calls at any time, whether the officers are at home or proceeding on their commutes.[1] The officers' time is not entirely their own during their commutes: they are required to have their weapons and other law enforcement-related equipment and to have on and monitor their vehicles' communication equipment. They are not allowed to run any personal errands in their government vehicles, so their commute must proceed directly from home to work and back again without unauthorized detours or stops.

The plaintiffs' suit alleged, *inter alia*, that the time they spent commuting was compensable under the Fair Labor Standards Act. The Court of Federal Claims considered cross-motions for partial summary judgment on the issue and granted the government's motion, deciding that the plaintiffs' commute time was not compensable. *Adams v. United States*, 65 Fed. Cl. 217 (2005). Since all other issues in the case had settled, the partial summary judgment disposed of the only remaining issue, and the Court of Federal Claims issued a final judgment. Many of the plaintiffs now appeal to this court. We have jurisdiction to review a final judgment of the Court of Federal Claims under 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A. *Jurisdiction*

The government argues that we lack jurisdiction due to a defective notice of appeal; specifically, the notice in this case does not enumerate the names of all 6,610 individual

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[1] This case does not require us to decide what FLSA mandates in the particular instances when plaintiffs are actually called on to respond to an emergency or otherwise deviate from their normal commutes. We address only plaintiffs' basic argument: that their normal commutes, without more, constitute compensable work.

appellants.[2] The government correctly notes that in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), the Supreme Court held that Federal Rule of Appellate Procedure 3(c) divested federal appeals courts of jurisdiction over appellants not expressly named in the notice of appeal. If *Torres* were still good law, we would have jurisdiction only over those plaintiffs whose names appear on the notice. However, Rule 3(c) was amended in 1993, after the Court's decision in *Torres*. It now states:

> The notice of appeal must ... specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X."

Fed. R.App. P. 3(c)(1). All of the appellants are represented by the same counsel, and the notice of appeal is of the form contemplated by the new Rule 3(c). The Notes of the Advisory Committee on the 1993 amendments state that "[t]he test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal." We accept that formulation of the test. Here, all of the appealing plaintiffs are listed in an appendix to their lead counsel's notice of appearance, which was duly served on the government soon after the notice of appeal. It is objectively clear to us and to the government that the plaintiffs listed on that appearance form intended to appeal. Since the present version of Rule 3(c) has been satisfied by appellants, we take jurisdiction over all plaintiffs named in the appearance of counsel. Therefore, each appellant so listed

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[2] The case is not structured as a class action.

shall be bound by our decision here.[3]

B. *Standard of Review*

We review a grant of summary judgment by the Court of Federal Claims *de novo*, drawing justifiable factual inferences in favor of the party opposing the judgment. *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed. Cir.1995) (*en banc*). The Court of Federal Claims applies the same summary judgment standard as do federal district courts: summary judgment is proper if the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Cl. R. 56(c); *cf.* Fed.R.Civ.P. 56(c).

C. *The Portal-to-Portal Act*

A few years after the enactment of FLSA, the Supreme Court decided *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). That case involved industrial workers who punched in at a time clock, but were not credited for the time they spent walking from the clock to their posts. *Id.* at 682-84, 66 S.Ct. 1187. The Supreme Court ruled that "the time spent in walking to work on the employer's premises, after the time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' " *Id.* at 691-92, 66 S.Ct. 1187 (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944)).

Congress reacted to *Anderson* by enacting the Portal-to-Portal Act of 1947, Pub.L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251-262). *See* 29 U.S.C. § 251(a) (Congressional finding that FLSA "has been interpreted judicially in disregard of long-established customs, practices,

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[3]Counsel for appellants agreed at oral argument that everyone listed on his notice of appearance would be so bound.

and contracts between employers and employees," with various negative consequences); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 519, 163 L.Ed.2d 288 (2005); *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 61, 73 S.Ct. 580, 97 L.Ed. 821 (1953) ("The Portal-to-Portal Act was enacted to remedy what were deemed to be some harsh results of our decision in *Anderson* ...."). The Act pared back the broad definition of compensable work initially promulgated by the Supreme Court in *Anderson*. "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and activities which are preliminary to or postliminary to said principal activity or activities" are excluded from FLSA's protections by the Portal-to-Portal Act; employers need not pay employees overtime or minimum wage for such activity. 29 U.S.C. § 254(a). The question of what sorts of activities are "preliminary or postliminary" was most recently addressed by the Supreme Court in IBP, in which the Court held that the time spent walking from a locker room where employees donned required protective gear to the work site was compensable. 126 S.Ct. at 524.

The Portal-to-Portal Act speaks specifically to vehicular travel:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a). Therefore, merely commuting in a government-owned vehicle is insufficient; the plaintiffs must perform additional legally cognizable work while driving to

their workplace in order to compel compensation for the time spent driving. The question in this appeal is whether the requirements and restrictions placed on plaintiffs' commutes rise to that level.

D. *Burden of Proof*

The plaintiffs argue that the burden of proof lies with the government in this case, relying on a statement by the Supreme Court that "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the government has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). However, the Portal-to-Portal Act does not create an "exemption" in the same sense as the Supreme Court used the term in *Corning*. The cases the Court cited in support for its statement in *Corning* all related to the total exclusion of a particular worker or workers from certain FLSA protections. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945) (issue was whether employees worked in a "retail establishment" and hence were wholly exempt from wage and hour requirements); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) (same); *Walling v. General Indus. Co.*, 330 U.S. 545, 547-48, 67 S.Ct. 883, 91 L.Ed. 1088 (1947) (whether employee was exempt due to being employed in "executive capacity"); *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295, 79 S.Ct. 756, 3 L.Ed.2d 815 (1959) (retail establishment). None of these cases speak to the exclusion of only some *activities* from FLSA; they all deal with the exempt status of a particular *worker* or workers. By settlement, the government has agreed that these plaintiffs are not FLSA-exempt. The issue of total FLSA exemption of the sort that the Supreme Court decided in *Corning* is therefore not before us.

Better guidance is found in *Anderson*, where the Court said: "An employee who brings suit ... for unpaid minimum wages or unpaid overtime compensation ... has the burden of proving that he performed work for which he was not properly

compensated." *Anderson*, 328 U.S. at 686-87, 66 S.Ct. 1187.[4] Typically, this question relates to whether the plaintiffs worked a certain amount of hours and whether those hours went uncompensated by the employer. However, there is an additional, earlier premise at issue in this case: namely, whether the alleged acts of the plaintiff constitute compensable "work" at all. The burden to prove that such work was performed necessarily includes the burden to demonstrate that what was performed falls into the category of compensable work. *See, e.g., Baker v. Barnard Constr.*, 146 F.3d 1214, 1216 (10th Cir.1998) (in Portal-to-Portal Act case, jury instruction "appropriately asks the jury *whether Plaintiffs have proved* that their return travel is compensable" (emphasis added)). Thus, the plaintiffs in this case had the burden of showing that their drive time was compensable work for FLSA purposes and of showing that it does not fall into the set of activities excluded from the definition of compensable work by the Portal-to-Portal Act as interpreted by our precedent.

Since the burden of proof is on the plaintiffs, we reject their argument that summary judgment to the government was improper because the government presented minimal evidence. Since the plaintiffs' evidence does not demonstrate any ground for relief (for reasons discussed below), the government need not present any evidence to rebut the documentary evidence presented by the plaintiffs.

E. *Merits*

This court decided a similar case in *Bobo v. United States*, 136 F.3d 1465 (Fed. Cir.1998). In *Bobo*, Border Patrol dog handlers raised a basically identical claim under FLSA. The dog handlers were required to commute to and from work in their government cars, monitor their vehicle radios, report mileage, be on the lookout for suspicious activity, and refrain

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[4] Although *Anderson*'s definition of compensable work was modified by the Portal-to-Portal Act, Congress did not speak to the issue of the burden of proof. This statement by the Court therefore remains good law.

from personal errands or detours. *Id.* at 1467. They were also required to stop to walk their dogs as needed. *Id.* The government credited the handlers an extra hour each day for dog care tasks at home but did not consider the driving time to be compensable. The dog handlers sued to obtain compensation for their commuting time.

In deciding *Bobo*, we noted with approval the Second Circuit's decision in *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2d Cir.1995), which stated that:

> The more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable * * * *The ability of the employer to maintain records of such time expended is a factor. And, where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it.

Id. at 650, quoted in *Bobo*, 136 F.3d at 1467. We concluded that though "the restrictions placed upon the INS Agents' commutes are compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities * * * the burdens alleged are insufficient to pass the de minimis threshold." *Bobo*, 136 F.3d at 1468 (citing *Anderson*, 328 U.S. at 692 ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.")). *Bobo* is not identical but very similar to the case before us. The primary difference between the commuting conditions in *Bobo* and those in this case militates against plaintiffs, who do not make uncompensated dog-walking stops. Under the Portal-to-Portal Act, plaintiffs' driving time is not compensable.

Some of the plaintiffs in this case argue that, unlike in *Bobo*, there was a "custom or practice" of compensating them for their commuting time. If such a "custom or practice" existed, the Portal-to-Portal Act could be read not to allow the

employer to cease compensating for the activity. *See* 29 U.S.C. § 252(a)(2). Those plaintiffs are correct that under Federal Personnel Manual System Letter No. 551-10, FLSA *non-exempt* officers were indeed compensated for their commute time. Prior to this litigation, though, the plaintiffs and other officers in the positions and grades at issue were classified as *exempt* from FLSA and were therefore not paid for their commutes. That exemption status has been changed by the settlement agreement, in which the government stipulated for the purpose of this case that the plaintiffs were non-exempt. Plaintiffs seize on this provision of the settlement to argue that, had the government not wrongly classified them as exempt, it would have applied Letter 551-10 and thus a "custom or practice" of compensation would have existed. However, hypothetical customs or practices do not suffice. In reality, the government did not compensate the plaintiffs for their commuting time; the plaintiffs cannot now rely on the settlement to rewrite history.

The plaintiffs also argue that 31 U.S.C. § 1344 should alter the outcome of this case. That statute is a money allocation provision that prohibits federal funds from being spent on transportation for other than official purposes. It makes clear that "transportation between the residence of an officer or employee and various locations that is ... essential for the safe and efficient performance of ... criminal law enforcement duties[ ] is transportation for an official purpose." *Id.* § 1344(a)(2). While the statute defines the commutes at issue here to be essential *to the agencies* for budgetary purposes, it does not follow that those commutes constitute compensable work *by the officers*. The fact that the commutes are not an illegal expenditure of government resources does not change the result: *Bobo* still teaches that commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*. That is the case here.

Neither these distinctions nor others advanced by the

plaintiffs are persuasive, and so the holding in *Bobo* controls the legal conclusion in this case.

III. CONCLUSION

Because *Bobo* entitles the government to judgment as a matter of law on the facts advanced by the plaintiffs, the Court of Federal Claims correctly granted summary judgment to the government. Its decision is therefore

AFFIRMED.

Adams v. U.S.
Fed. Cl.,2005.
United States Court of Federal Claims.
Stephen ADAMS, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.
No. 90-162C.
April 27, 2005.

OPINION

BUSH, Judge.

The court has before it three pending motions for partial summary judgment on "driving time" overtime pay claims: Defendant's Motion for Partial Summary Judgment of August 12, 2002 (Def.'s 2002 Mot.), Plaintiffs' Motion for Partial Summary Judgment Regarding the "Driving Time" Issue of August 2, 2004 (Pls.' 2004 Mot.) and Defendant's Cross-Motion for Partial Summary Judgment of September 22, 2004 (Def.'s 2004 Mot.). In this court's recent opinion deciding another partial summary judgment motion in this case, *Adams v. United States*, No. 90-162C and Consolidated Cases, slip op. at 2 (Fed. Cl. Dec. 1, 2004) (*Adams III*), the court held in abeyance its determination of the 2002 and 2004 driving time motions to permit the completion of briefing.[1] Although the three motions before the court present different factual and legal issues, the common underlying issue of the compensability or noncompensability of driving time for all of the concerned plaintiffs compels the court to consider all of these driving time claims, and defendant's defenses to them, in

[1]The court also held in abeyance its decision on Defendant's Cross-Motion for Partial Summary Judgment as to Certain Plaintiffs filed on June 26, 2002, which is issued in a separately published opinion of this date.

one opinion.

BACKGROUND

This matter has a long history, much of which has been recounted in *Adams v. United States*, 27 Fed. Cl. 5 (1992) (*Adams I*), *rev'd and remanded*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir.1998) (Table and Unpublished Opinion) (*Adams II*), and *Adams III*. Only the facts relevant to the motions at hand are related here. Of the many plaintiffs pursuing overtime pay claims under the Fair Labor Standards Act of 1938, 29 U.S.C. § § 201-219 (2000) (FLSA), in these consolidated cases, several thousand have settled their overtime pay claims related to a prior classification as FLSA-exempt employees but reserved their right to litigate additional overtime pay claims for time spent driving to and from work in government-issued vehicles. Three groups of plaintiffs, defined most easily by the settlement agreements that encompassed their positions, are before the court on the driving time motions.

Defendant's 2002 motion addressed the driving time claims of two groups of plaintiffs. The first group of plaintiffs were United States Secret Service (USSS) employees, working in "occupational codes 080 and 391 [as] non-supervisory GS-9s and 11s, and occupational codes 072 and 1397[as] non-supervisory GS-9s." Def.'s 2002 Mot.App. at 1 (July 9, 1999 Settlement Agreement). The second group of plaintiffs were United States Customs Service (USCS) employees, working in "occupational code 1801, Marine Enforcement Officers, GS-9 through GS-11." Def.'s 2002 Mot.App. at 12 (August 9, 2000 Settlement Agreement). Although the terms of the 1999 and 2000 settlement agreements vary regarding pay and other matters specific to the USSS or USCS plaintiffs, the language reserving the right to pursue driving time claims is identical:

> Such back pay does not constitute compensation for time spent driving a government vehicle from home to work and from work to home, and this agreement does not cover or affect any claim plaintiffs may have for additional back

> pay for such driving time, which shall be litigated in these consolidated cases.

Def.'s 2002 Mot.App. at 3 (July 9, 1999 Agreement ¶ 3.A at 3), App. at 14 (August 9, 2000 Agreement ¶ 3.A at 3 (where the term "Agreement" is capitalized but the text is otherwise as quoted)). Because the pertinent legal terms of the 1999 and 2000 settlement agreements are identical, the claims of the first and second groups of plaintiffs at issue in defendant's 2002 motion raise common legal issues as to the scope of the claims preserved by the settlement agreements and the stipulations of partial dismissal filed with this court related to those agreements.

The third group of plaintiffs, those at issue in the 2004 cross-motions, were employed at the Bureau of Alcohol, Tobacco and Firearms (BATF), USCS, the Drug Enforcement Administration (DEA), Internal Revenue Service-Criminal Investigation Division (IRS-CID) and USSS in occupational series 1811 at grade GS-12, and settled their overtime pay claims related to a prior classification as FLSA-exempt employees on August 29, 2003. Pls.' 2004 Mot. at 1-2. The language preserving driving time claims in the 2003 settlement agreement differs from the 1999 and 2000 agreements in two ways. First, the 2003 settlement agreement states that

> Solely for the purposes of litigating the plaintiffs' claims to recover for driving time, it is agreed and stipulated herein that such plaintiffs while employed by the agencies [BATF, IRS-CID, DEA, USCS, and USSS] as GS-12-1811s were FLSA non-exempt.

Bernstein Decl. Ex. 1 (August 29, 2003 Agreement) ¶ 5.M at 8. There was no stipulation as to the non-exempt status of the plaintiffs for prior employment periods in the *220 1999 and 2000 agreements. Second, the description of the preserved driving time claims evolved over time. In the 1999 and 2000 agreements, these claims are referred to as "time spent driving a government vehicle from home to work and from work to home." Def.'s 2002 Mot.App. at 3 (July 9, 1999 Agreement ¶

3.A at 3), App. at 14 (August 9, 2000 Agreement ¶ 3.A at 3). In the 2003 agreement, the preserved driving time claims are described as "time solely spent driving a government vehicle from home to work and work to home." Bernstein Decl. Ex. 1 (August 29, 2003 Agreement) ¶ 5.M at 8. Because of the differences in the settlement agreement terms preserving the driving time claims by way of stipulations of partial dismissal with this court, the claims of the first two groups of plaintiffs may raise different legal issues than those of the third group of plaintiffs.

The 2002 and 2004 motions have been fully briefed. Oral argument was held on the driving time issue on April 15, 2005. Based on the record before the court and for the reasons set forth herein, defendant's 2002 motion is granted. Plaintiffs' 2004 motion for partial summary judgment on the driving time issue is denied, and defendant's 2004 motion for partial summary judgment on the driving time issue is granted.

DISCUSSION

I. Standard of Review

This action is before the court on three motions for partial summary judgment. Defendant's 2002 motion concerns the driving time claims of the first two groups of plaintiffs. The 2004 cross-motions regard the driving time claims of the third group of plaintiffs. When the court considers cross-motions for summary judgment, each motion is evaluated under the same summary judgment standard. *Cubic Def. Sys., Inc. v. United States*, 45 Fed. Cl. 450, 457 (1999).

The availability of summary judgment helps a federal court "'to secure the just, speedy, and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). Summary judgment is appropriate where there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of the Rules of the United States Court of Federal Claims (RCFC); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91

L.Ed.2d 202 (1986). A fact is material if it would affect the outcome of the suit. *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505. The moving party bears the burden of showing that there is an absence of any genuine issue of material fact. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir.1994) (citing *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548). All doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir.1987).

However, the non-moving party has the burden of producing sufficient evidence that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. *Anderson v. Liberty Lobby*, 477 U.S. at 256, 106 S.Ct. 2505. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Anderson v. Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. 2505; *Mingus*, 812 F.2d at 1390-91; *see also Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir.1984) (in making a determination as to whether genuine issues of material fact exist, the court is not to accept a party's bare assertion that a fact is in dispute). "The party opposing the motion must point to an evidentiary conflict created on the record by at least a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." *Barmag*, 731 F.2d at 836. Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

II. Compensable Driving Time Claims

A. Statutory and Regulatory Framework

1. FLSA Overtime Pay Requirement

One purpose of the Fair Labor Standards Act of 1938 was to ensure that a covered employee received compensation for all hours worked for the employer:

> The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.

Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602, 64 S.Ct. 698, 88 L.Ed. 949 (1944) (*Tennessee Coal*). "All time spent by an employee performing an activity for the benefit of an agency [of the federal government] and under the control or direction of the agency is 'hours of work.'" 5 C.F.R. § 551.401(a) (2005). In addition, FLSA overtime provisions require time and a half pay for hours worked beyond a weekly maximum hour limit. 29 U.S.C. § 207. Under FLSA, the federal government merely has to permit or suffer a federal employee to work overtime-no specific overtime authorization is needed for the extra hours to be compensable. *Doe v. United States*, 372 F.3d 1347, 1360-61 & nn. 6-7 (Fed. Cir.2004).

2. Early Travel Time Cases

The Supreme Court has interpreted FLSA to require compensation for certain travel activities on the employer's premises, such as travel underground from a mine entrance to the location worked, *Tennessee Coal*, 321 U.S. at 603, 64 S.Ct. 698, or the time needed to walk from a time clock to an actual work station, if more than a *de minimis* number of minutes, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Because *Anderson* and similar cases expanded employer pay liability for activities such as "opening windows, switching on lights, and walking to * * * work stations," Congress acted to reduce employer liability. *Bobo v. United States*, 37 Fed. Cl. 690, 692 n. 3

(1997) (*Bobo I*), *aff'd* 136 F.3d 1465 (Fed. Cir.1998) (*Bobo II*). Congress amended FLSA by enacting the Portal-to-Portal Act of 1947, now codified at 29 U.S.C. § § 251-62 (2000).

3. Portal-to-Portal Act Provisions and Their Interpretation

The relevant Portal-to-Portal Act provisions are set forth at 29 U.S.C. § 254 and except the following activities from FLSA liability because they are noncompensable:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities* * * *

29 U.S.C. § 254(a)(1)-(2). The Supreme Court had occasion to interpret the extent of these exceptions to compensable activities under FLSA in two cases handed down on January 30, 1956. Neither case dealt with travel time, but these cases, *Steiner v. Mitchell*, 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267 (1956) and *Mitchell v. King Packing Co.*, 350 U.S. 260, 76 S.Ct. 337, 100 L.Ed. 282 (1956), provide the standard by which courts may now measure whether an employee's activity at the beginning or end of the workday is noncompensable because of the Portal-to-Portal Act.

In *Steiner*, the Supreme Court found that workers in a battery plant that used caustic and toxic materials were compelled by health, hygiene and safety considerations and encouraged by state law to change their clothes immediately before and after work, and to shower in the employer's facilities. 350 U.S. at 249-51, 76 S.Ct. 330. Because these activities were "an integral and indispensable part of the [employee's] principal activities * * * and are not specifically excluded by Section 4(a)(1) [now codified at 29 U.S.C. §

254(a)(1)]," the Supreme Court determined that the time spent changing clothes and showering was compensable and did not fit into any Portal-to-Portal Act exception. *Id.* at 256, 76 S.Ct. 330. In *King Packing*, the Supreme Court found that meat-cutters who held positions as "knifemen" in a meat-packing plant were required to keep their knives razor-sharp as a condition of their employment. 350 U.S. at 262, 76 S.Ct. 337. The time the meat-cutters spent sharpening these knives before or after shifts or during lunch breaks was found by the Court to be compensable under FLSA, because this activity was "an integral part of and indispensable to the various butchering activities for which they were principally employed." *Id.* at 263, 76 S.Ct. 337. Thus, even activities which are preliminary or postliminary to a work-shift may be compensable if these activities are integral and indispensable to the employee's principal work activities.

4. *De Minimis* Rule

Even if a preliminary or postliminary activity would be compensable under the *Steiner* "integral and indispensable" standard, inconsequential daily amounts of time in this compensable category of activities will not create FLSA liability. *Bobo II*, 136 F.3d at 1468 (citing *Anderson*, 328 U.S. at 692, 66 S.Ct. 1187). The *de minimis* rule limiting FLSA liability for preliminary or postliminary employee activity was stated in *Anderson:*

> When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

328 U.S. at 692, 66 S.Ct. 1187. The Federal Circuit has adopted a three-factor analysis from *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir.1984), for the proper application

of the *de minimis* rule to FLSA claims: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Bobo II*, 136 F.3d at 1468.

5. Custom or Practice of Compensability

A limitation on the Portal-to-Portal Act exception of preliminary and postliminary activities from FLSA-compensable work is found in section 254(b):

> (b) Compensability by contract or custom
>
> Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either-
>
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

29 U.S.C. § 254(b). The application of section 254(b) to federal employees is little discussed in cases before this court or its predecessors. The Federal Labor Relations Authority (FLRA) read section 254(b)(1) to support an arbitrator's award which had interpreted a collective bargaining clause to require longer temporary duty commutes to be compensated for the amount of time they exceeded the IRS employee's normal commute. *United States Dep't of the Treasury Internal Revenue Serv. v. Nat'l Treasury Employees Union*, 57 F.L.R.A. 444, 2001 WL 950798 (2001) (*Treasury I*). The FLRA also

read section 254(b)(2) to support an arbitrator's award which found that the Navy's then existing custom of allowing wharfbuilders to commute to job sites from the Navy compound during their paid shifts, as opposed to a newer practice of requiring these employees to take a ferry to a job site on their own, unpaid time, created a duty for the Navy to pay overtime for those ferry commutes. *United States Dep't of the Navy Public Works Ctr. Pearl Harbor, Haw. v. Int'l Ass'n of Machinists Haw. Fed. Lodge 1998*, 55 F.L.R.A. 487, 1999 WL 362325 (1999) (*Navy*).

The United States Court of Appeals for the District of Columbia Circuit has also discussed section 254(b) in the context of federal employees, at least tangentially, with an interesting result. *United States Dep't of the Air Force v. Fed. Labor Relations Auth.*, 952 F.2d 446 (1991) (*USAF*). The Circuit Court in *USAF* considered whether the Office of Personnel Management (OPM) regulation characterizing preliminary and postliminary activities not closely related to a federal employee's principal work activity as noncompensable, 5 C.F.R. § 551.412(b), permitted negotiation for compensation for these activities through the collective bargaining process. *Id.* at 450-52. The Circuit Court decided, over a vigorous dissent, that the regulation prohibited such negotiated compensation, and overruled the underlying FLRA decision. *Id.* at 451. *USAF* could be read to eliminate the availability of section 254(b)(1) employer-employee agreements permitting compensation for non-integral preliminary or postliminary activities for federal employees, at least in the District of Columbia Circuit. It should be noted that the Circuit Court declined to reach the issue of whether the OPM regulation was in conflict with section 254(b), and suggested that "any challenge to the legality of the OPM regulation under [section 254(b)] must be brought in an appropriate forum." *Id.* at 453.

The United States Claims Court entertained a FLSA overtime pay claim for federal employees based largely on a "custom or practice" justification pursuant to section 254(b).

Graham v. United States, 3 Cl.Ct. 791 (1983). Because the facts did not support either an express agreement or a custom or practice of compensating the activities at issue, however, the court found section 254(b) to "not have any applicability to the present case." *Id.* at 795. In *Graham*, the Claims Court did not comment on the applicability of section 254(b) to the claims of federal employees as a general matter, or if there were special considerations in its application because of the nature of federal employment.

The most recent FLRA decision the court has found regarding the applicability of section 254(b) to federal employees reviewed the holdings of *USAF, Navy* and *Treasury I. Nat'l Treasury Employees Union v. United States Dep't of the Treasury Internal Revenue Serv. Washington, D.C.*, 59 F.L.R.A. 119, 2003 WL 22142504 (2003) (*Treasury II*). Applying *USAF*, and noting that *Navy* and *Treasury I* did not consider arguments concerning a governing OPM travel regulation, 5 C.F.R. § 551.422(b), the FLRA found that section 551.422(b) prohibited the negotiation of compensation for longer commuting time endured as a result of a temporary duty assignment within the boundaries of the employee's official duty station. *Treasury II*, 59 F.L.R.A. 119. This holding produced the opposite result of the decision accorded the same union in *Treasury I*. The decision in *Treasury II* turned on this language in section 551.422(b):

> (b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work....

5 C.F.R § 551.422(b) (2005). Noting that negotiations for compensation prohibited by government-wide regulation cannot be allowed, the FLRA denied the union's request to negotiate a proposed commuting time compensation provision for temporary duty assignments. *Treasury II*, 59 F.L.R.A. 119. The FLRA noted that it had no jurisdiction to review the legality of section 551.422(b) in relation to the provisions of

the Portal-to-Portal Act. *Id.* The decision does call into question the validity of employment agreements of federal employees that allow for compensation of commuting time, compensation which is nevertheless prohibited by section 551.422(b).[2]

In sum, the court is unaware of any binding precedent as to how the section 254(b) limitations on the Portal-to Portal Act's exceptions to FLSA compensability of activities at the beginning or end of a workday or commuting time apply to federal employees. The court notes that the limitations of the exception could lead to a curious result in the federal employment sector. Consider the hypothetical situation of a federal agency "custom or practice" which at a certain point in time interpreted FLSA to afford compensation for a non-integral preliminary or postliminary activity, or a type of commuting. Then, some time later, this interpretation is discovered to have been incorrect as a general rule, and controlling authority bans this court from awarding compensation for those activities. Would section 254(b)(2) and its definition of compensability, triggered because of an incorrect statutory interpretation by the federal employing agency, then trump the controlling legal authority that later pronounced such activities noncompensable? That would appear to be one interpretation of the statutory language, if indeed section 254(b) functions in the federal employment sector exactly as it does in the private sector. The court notes that this might lead to widely disparate compensation practices

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[2]The rationale in *USAF* relied upon in *Treasury II* is that the federal government cannot negotiate employment agreements in conflict with government-wide regulations, pursuant to 5 U.S.C. § 7117 (2000). *See USAF*, 952 F.2d at 451 ("If the OPM had meant for postliminary activity to be compensable through negotiation under the FLSA, it would have had to affirmatively grant that right in these or other regulations in order not to run afoul of § 7117 of the F[ederal] S[ervice] L[abor] M [anagement] R[elations] S[tatute] and its designation as nonnegotiable any proposal inconsistent with government-wide regulations such as the provisions under the FEPA or the FLSA barring such compensation.").

between different federal agencies, based merely upon a historical mistake in statutory interpretation at some of the agencies, and those mistakes could perpetuate those inequities for years. It could not have been the intent of Congress to replace federal employee compensation rights, as determined by specific authorizing statutes and regulations, with the quirks of incorrect managerial practices within federal agencies.

Because of these concerns, and because of the differences between federal employment, where compensation is governed largely by statute, and private employment, where compensation is governed primarily by contract, *see Adams v. United States*, 391 F.3d 1212, 1221 (Fed. Cir.2004) (" 'Though a distinction between appointment and contract may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service.' " (citing *Kizas v. Webster*, 707 F.2d 524, 535 (D.C.Cir.1983))), *petition for cert. filed*, 73 U.S.L.W. 3558 (U.S. Mar. 9, 2005) (No. 04-1225), the court will examine any application of section 254(b) to the facts of this case to ensure that the agreements, customs or practices alleged to exist squarely fall within the ambit of section 254(b) as it applies to federal employees.

6. Employee Commuting Flexibility Act of 1996 (ECFA)

ECFA amended the Portal-to-Portal Act by adding the following language to 29 U.S.C. § 254(a):

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a) (2000). As the Tenth Circuit explained the purpose of this amendment, "[t]he Portal-to-Portal Act was subsequently amended by the Employee Commuting Flexibility Act of 1996 to clarify that otherwise non-compensable commuting to work is not compensable merely because the employee uses his employer's vehicle." *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1117 (10th Cir.1999). This provision was placed in the noncompensability subsection of the Portal-to-Portal Act provisions, titled "Activities not compensable." 29 U.S.C. § 254(a). There is no provision in the compensability section of the Portal-to-Portal Act, 29 U.S.C. § 254(b), regarding the use of an employer's vehicle for commuting purposes. Thus, ECFA states that the use of an employer's vehicle for commuting is "not considered part of the employee's principal activities" under certain conditions, yet makes no statement as to when commuting time in employer-provided vehicles would be part of an employee's principal activities and compensable.

The word "agreement" is not defined in the statutory language of ECFA itself. Indeed, Congress rejected an amendment which would have required the agreement between employer and employee to be "knowing and voluntary, and [not imposed] as a condition of employment." H.R.Rep. No. 104-585, at 11 (1996) (Minority Views). Because the term "agreement" is subject to multiple interpretations, this court looks to the legislative history to define this term. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1252 (Fed. Cir.2000) ("When the language of a statute fails to provide clear and unambiguous direction, we may turn to the statute's legislative history." (citing *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991))).

The agreement regarding the use of the employer's vehicle for commuting need not be in writing, and may be based on no more than a mutual understanding of company practices. H.R.Rep. No. 104-585, at 4 (1996) (Committee Statement and Views) ("While H.R. 1227 [(the ECFA bill)] does not require a written agreement, this requirement may be satisfied through a formal written agreement between the employee and employer, a collective bargaining agreement between the employee's representative and the employer, or an understanding based on established industry or company practices."). At least one purpose of the agreement, from the employer's standpoint, is to define the commuting time as uncompensated. *Id.* at 11 (Minority Views) ("The Majority chose to leave H.R. 1227 weak on the issue of employee voluntariness, preferring to grant employers wide latitude to impose, as a condition of employment, non-voluntary and non-compensable employee use of the employer's vehicle.").

It is clear that the primary purpose of ECFA was to limit employer liability for FLSA claims related to commuting time in employer-provided vehicles. *See id.* at 3 (Background) (noting that ECFA would address a situation where employers were "vulnerable to back pay lawsuits by both the Department of Labor and employees"), at 8-9 (Budget Authority and Congressional Budget Office Cost Estimate) ("If, under current law, the courts determine that the time spent commuting in a company vehicle and on incidental activities is subject to compensation, state and local governments would face additional costs. H.R. 1227 [(ECFA)] would eliminate this potential liability."). It would be incongruous at best to read the statute, an amendment ensuring noncompensability under FLSA as long as minimal conditions are met, as *mandating* compensability for employee commutes in employer-provided vehicles if no agreement is alleged to exist between the employer and the employee regarding the noncompensability of those commutes. Yet this is precisely the argument that plaintiffs make here. *See* Pls.' 2004 Mot. at 20 (noting that

defendant has not alleged the existence of an employer-employee agreement concerning the noncompensability of commuting time and concluding that "ECFA affirmatively supports plaintiffs' entitlement to be paid for driving a government vehicle between home and work").

This negative inference from the statutory language of ECFA cannot stand. As defendant points out, this court in *Bobo I* determined that the evidentiary record in that case did not support the government's allegation of the existence of an employer-employee agreement concerning commuting time noncompensability. 37 Fed. Cl. at 697. Yet, the court ruled in favor of the government and determined those commutes to be noncompensable. *Id.* at 703. This ruling was affirmed in *Bobo II*. If ECFA mandated compensation where no agreement has been alleged, as plaintiffs contend, the Federal Circuit's decision in *Bobo II* would have been wrongly decided, but this is not so. ECFA does not support plaintiffs' position because, as this court stated in *Bobo I*, "[b]y its own terms, the 1996 amendment [(ECFA)] applies only if the use of the employer's vehicle for commuting purposes is subject to an employee-employer agreement that precludes compensation for such commutes." *Id.* at 697. The court has reviewed other court decisions interpreting ECFA and has found no decision that interprets ECFA to mandate compensability in the absence of an employer-employee agreement fixing the noncompensability of commuting time in employer-provided vehicles. The court is not willing to read into ECFA an inference that is not supported by its statutory terms, legislative history, caselaw or logic.

ECFA is "fully retroactive" in effect, *see, e.g., Baker v. GTE North Inc.*, 110 F.3d 28, 29 (7th Cir.1997), and would apply to the facts of this case, as a defense against liability under FLSA, if any employer-employee agreement fixing the noncompensability of commuting time had been alleged. The briefing of defendant's 2002 motion makes no reference, however, to such an agreement. Neither party in the 2004

motion briefing argues that an employer-employee agreement regarding the noncompensability of commuting time applies to the driving time claims at issue in these motions. Because there has been no allegation in any of the motions of such an agreement, ECFA is inapplicable to the summary judgment motions reviewed here.

B. Driving Time Pay Claims Cases

There has been extensive litigation of driving time pay claims under FLSA for what might be called commuting time claims. The court will focus primarily upon decisions of such claims in the law enforcement arena, as it finds that the particular demands upon law enforcement personnel, such as plaintiffs, present common issues for courts to consider as they apply FLSA to similar facts. Furthermore, where controlling authority has interpreted FLSA on analogous facts, it is not the job of this court to conduct a *de novo* analysis of the relevant statute. *See Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir.2005) ("We reject the [trial] court's initial de novo interpretation of [the statute at issue in that appeal] because the Court of Federal Claims may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit any more than the Federal Circuit can deviate from the precedent of the United States Supreme Court.").

1. *Reich*

Of initial interest is the Second Circuit's review of canine unit police officers' rights to compensation for commuting to and from work with their dogs. *Reich v. New York City Transit Auth.*, 45 F.3d 646 (2nd Cir.1995) (*Reich*). In *Reich*, the officers' principal duty was to patrol the New York City subways in the company of their dogs. *Id.* at 647. One of each officer's job requirements was to transport the dog to and from the officer's home, where the dog was lodged. *Id.* The United States Department of Labor (DOL) claimed that the entire commute was work time, and won below. *Id.* The Second Circuit carefully reviewed the law under FLSA and the Portal-to-Portal Act, including the decisions in *Anderson*, *Steiner*,

Mitchell and *Lindow*, all discussed *supra*, and summed up the standard for reviewing commuting time claims:

> While no clear standards emerge, certain generalizations can be drawn from these authorities. The more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable. Commuting and similar activities are generally not compensable. The ability of the employer to maintain records of such time expended is a factor. And, where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it.

Id. at 650. The Federal Circuit has adopted the standard elucidated in *Reich* for deciding commuting time claims. *Bobo II*, 136 F.3d at 1468 ("We agree with the interpretation of the Portal-to-Portal Act set forth in *Reich** * * *").

Applying that standard, the Second Circuit first determined that "dog-care" work that occurred during the commute was compensable, despite the Portal-to-Portal Act amendments, because "[f]eeding, training, and walking are work and are indispensable to the dogs' well-being and to the employer's use of the dogs in its business." *Reich*, 45 F.3d at 650. Next, the *Reich* court determined that the requirement of not taking public transportation, the burden of having the dog in the car, and the obligation of being ready to perform dog-care work as needed did not transform the remainder of the commuting time into work time. *Id.* at 651. The court held that "the activity of commuting involved neither exertion nor loss of time" and that "during the major part of commuting time no work is required." *Id.* at 651-52.

The final step in the analysis employed by the *Reich* court was to determine whether the compensable work activities that occurred during commuting time were "so negligible as to be *de minimis* and therefore not compensable under the FLSA." *Id.* at 652. Applying the three *Lindow* factors for *de minimis*

work, the Second Circuit reviewed the evidence in the record of a three-day bench trial and found the dog-care work to be "insubstantial," not "regularly occurring" and that "[t]he task of recording the time spent in such duties, when they arise, might well exceed the time expended in the performance of the duties." *Id.* at 652-53. The Reich court concluded that for these canine unit police officers, "these episodes of additional compensable work are *de minimis* and, therefore, need not be compensated." *Id.* at 653. The Sixth Circuit, citing *Reich* as "the leading case" for canine police officer commuting claims, upheld a summary judgment against similar plaintiffs, because those "[p]laintiffs ... have not adduced evidence that canine officers spend more than a de minimis amount of time during their commutes engaged in such [dog-care] activities." *Aiken v. City of Memphis, Tenn.*, 190 F.3d 753, 758 (6th Cir.1999).

2. *Bobo I*

This court decided cross-motions for summary judgment concerning commuting time claims of Immigration and Naturalization Service (INS) border patrol agent canine handlers in *Bobo I*, 37 Fed. Cl. at 690, 703. To these claims, the court applied the *Reich* standard. *Id.* at 698. As in *Reich*, the court found that some of the activities that the plaintiffs alleged to have occurred during their commutes would be potentially compensable:

> certain activities that plaintiffs claim to perform while commuting-conducting searches; taking care of their canines; responding to sensors and immigration related calls; and rendering assistance to state, local, and other government agencies-would be integral and indispensable to their principal activities.

Id.

However, most of the commuting time was noncompensable, because this court, like the *Reich* court, did not find that the burdens and restrictions placed on the plaintiffs during their commutes transformed the commuting time into work time. *Id.* at 699-700. The noncompensable burdens

included "listening to and signing on and off their vehicle radios, observing traffic, and looking out for suspicious activity." *Id.* at 699. The *Bobo I* court cited *Agner v. United States*, 8 Cl.Ct. 635, 638 (1985), *aff'd* 795 F.2d 1017 (Fed. Cir.1986) (Table), for "the proposition that otherwise noncompensable time is not rendered compensable for FLSA purposes because of a requirement that an employee listen and respond to an employer-owned radio." 37 Fed. Cl. at 700. The restrictions that were imposed, "the prohibition against personal use of their government-owned vehicles and the requirement that they wear their uniforms while driving," also did not transform commuting time into work, because these agents "enjoy the benefit of saving money by commuting in government-owned vehicles rather than their personal vehicles" and because controlling precedent has ruled that "travel to and from work in a government-owned vehicle is not compensable." *Id.* at 699 n. 13.

Finally, completing the *Reich* analysis, this court considered whether the potentially compensable activities alleged to have occurred during the agents' commutes would be more than *de minimis*. *Id.* at 701-03. Relying on plaintiffs' declarations concerning dog-care duties and responding to immigration-related calls and emergency calls, the court found that

> [t]he activities plaintiffs engage in while driving to and from their sector offices before and after their paid workdays begin and end are de minimis and therefore noncompensable. None of these activities occurred regularly, and, more importantly, when they did occur, they lasted for a short period of time, which is insubstantial in the aggregate. Finally, the INS would be hard-pressed to establish a workable system for recording this time. For these reasons, the duties plaintiffs claim to perform while commuting are *de minimis*.

Id. at 703 (footnotes omitted). Because plaintiffs' claims were for work that fell within the *de minimis* standard, the court

granted defendant's cross-motion for summary judgment.

3. *Bobo II*

Bobo II affirmed the judgment in *Bobo I*, "[b]ecause any work performed by the INS Agents during their commutes that was otherwise compensable under the FLSA was *de minimis* in nature." 136 F.3d at 1466. The Federal Circuit noted that "[v]iewing the pleadings and submissions in the light most favorable to the INS Agents, we accept as true that the restrictions placed upon the INS Agents' commutes are compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities." *Id.* at 1468. The *Bobo II* court reviewed the restrictions placed on the commuting time period, and found that "the main restriction on the INS Agents is the prohibition on making personal stops during their commute. However, such a restriction on their use of a government vehicle during their commuting time does not make this time compensable." *Id.* The Federal Circuit also found that the other alleged burdens "d[id] not pass the *de minimis* threshold," because "they are infrequent, of trivial aggregate duration, and administratively impracticable to measure." Summary judgment was justified because the commuting time duties "d[id] not give rise to a valid or even triable claim for compensation under the FLSA." *Id.*

4. Other Jurisdictions

The *Reich* analysis of the compensability of commuting time has been widely cited and followed when deciding FLSA claims in the law enforcement context. *See, e.g., Aiken,* 190 F.3d at 758 (citing both *Reich* and *Bobo II* and denying claims because the plaintiffs' evidence showed only *de minimis* work during commutes); *Jerzak v. City of S. Bend,* 996 F.Supp. 840, 848 (N.D.Ind.1998) (citing *Reich* and denying commuting time claims); *Hellmers v. Town of Vestal, N.Y.,* 969 F.Supp. 837, 843 (N.D.N.Y.1997) (citing *Reich* and denying commuting time claims); *Bolick v. Brevard County Sheriff's Dept.,* 937 F.Supp. 1560, 1565-66 (M.D.Fla.1996) (citing *Reich* and denying compensation for commuting time); *see also*

Bartholomew v. City of Burlington, Kan., 5 F.Supp.2d 1161, 1170 (D.Kan.1998) (not citing *Reich* but similarly applying the holdings in *Steiner, Anderson* and *Lindow* to deny claims for commuting time claims); *Kennedy v. State*, 688 N.W.2d 473, 477-78 (Iowa 2004) (not citing *Reich* but citing *Aiken* and *Hellmers* and concluding that "these officers' drive time was no more than a non-compensable commute under the FLSA"). The *Reich* analysis has also been cited and approved in other FLSA cases where the employee is not a law enforcement officer but another type of employee. *See, e.g., Tum v. Barber Foods, Inc.*, 360 F.3d 274, 279, 281 (1st Cir.2004) (citing *Reich* and denying a "walking time" claim for the time it took employees to reach the time clock after donning required protective and hygienic gear); *Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234, 249 (D.Mass.2004) (following *Reich* to determine that "commutes do not constitute a primary activity" unless the workday begins before, or continues after, the driving time of the employees concerned); *see also Smith v. Aztec Well Servicing Co.*, 321 F.Supp.2d 1234, 1237-38 (D.N.M.2004) (not citing *Reich*, but applying the holdings of *Steiner* and *Lindow* to deny commuting claims because only *de minimis* work occurred during the commutes). The overwhelming weight of authority supports the *Reich* analysis of commuting time claims under FLSA.

Plaintiffs cite three cases for the proposition that "FLSA may require an employee to be compensated for his or her integral and indispensable travel time even where no activities other than driving are performed during the travel." Pls.' 2004 Opp. at 16 n. 5. This proposition appears to offer an alternative to the *Reich* analysis of commuting time claims. Plaintiffs' cases, however, are not persuasive.

The first case offered by plaintiffs, *Baker v. Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir.1998), does indeed state that "travel time meeting the 'integral and indispensable' test must be compensated pursuant to the FLSA" and applied this statement of the law to a commuting time claim. *Id.* at 1216.

However, the facts of that case can be readily distinguished from the claims here. In *Baker*, the commute occurred in private vehicles provided by the employees, who were required to transport fully fueled and stocked welding rigs. *Id.* at 1215. The employer "did not pay [the] Plaintiffs for their return travel time associated with refueling and restocking the welding rigs in the evenings." *Id.* Unlike *Reich* and the case here, the commute in *Baker* was not in a law enforcement context. In addition, the burdens upon the commute were considerable, and far exceeded the burdens discussed in *Reich* or *Bobo II*. *Cf. Dooley*, 307 F.Supp.2d at 248 (distinguishing *Baker* from *Dooley* because in *Baker*, "the act of driving equipment itself constituted substantial work, either because of additional responsibilities or the extensive nature of the equipment being transported"). Because the type of commuting in *Baker* was of a different nature than the commuting here and in *Reich*, *Baker* must be distinguished as not readily applicable to the facts at hand. To the extent that the Tenth Circuit in *Baker* could be read to apply a more easily met standard for compensable travel time under FLSA than that applied by the Second Circuit in *Reich*,[3] a reading the court does not endorse, the court recognizes that the Federal Circuit has adopted the *Reich* analysis and that the *Reich* analysis is controlling law in this circuit.

The second case cited by plaintiffs is an unreported decision, *Steelman v. Telco Tel. Co.*, No. CIV. 00-518-JO, 2001 WL 21361 (D. Or. Jan.5, 2001). *Steelman* cited *Reich*, however, and endorsed the *Reich* analysis of commuting time claims. *Id.* at *3. *Steelman* thus supports defendant's position here, not plaintiffs'. Denying cross-motions for summary

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[3]Even where *Baker* is the controlling law, an analysis similar to the *Reich* analysis has been applied to commuting time claims for time spent commuting in an employer-provided vehicle where the burdens alleged were minimal in comparison with the benefits of convenient and free transportation to and from the work site. *Smith*, 321 F.Supp.2d at 1237. As in *Reich*, the commuting time in *Smith* was ruled to be noncompensable. *Id.*

judgment on the FLSA claims before it, *Steelman* held only that disputed facts postponed the application of the *Reich* analysis. *Id. Steelman* thus provides no support for plaintiffs' alternative to the *Reich* analysis.

Plaintiffs' third case is *Graham v. City of Chicago*, 828 F.Supp. 576 (N.D.Ill.1993). This is an early case in a series of decisions discussing commuting time claims for canine unit officers. *Id.* at 579 ("Though several courts have addressed the issue of home care for police canines, the issue of whether transporting the animals to and from work is compensable has not been squarely addressed."). The *Graham* court, unlike *Reich*, treated the entire commute time as compensable because the officers were transporting the dogs to and from work, even though no additional burden or work occurred during the driving time. *Id.* Although there are minor factual differences between *Graham* and *Reich*, these decisions cannot be reconciled. The *Reich* court noted that the lower court decision on appeal in *Reich* had followed *Graham* in ruling commuting time compensable, *Reich*, 45 F.3d at 648, and reversed the lower court's ruling in favor of the appellees' claim for compensation, *id.* at 653. Because the Federal Circuit in *Bobo II* endorsed *Reich*, the *Reich* analysis of commuting time compensability under FLSA, not the *Graham* analysis, governs this court. The *Graham* analysis appears to be an interpretation of the Portal-to-Portal Act which is in a distinct minority and is probably no longer good law. *See Dooley*, 307 F.Supp.2d at 248 ("*Graham* remains, but it is contradicted by extensive case law reaching the opposite conclusion.").

Plaintiffs have failed to persuade the court that the *Reich* analysis adopted by *Bobo II* is incorrect. Controlling and persuasive authority argue otherwise. The court now applies the *Reich* analysis and the holding of *Bobo II* to plaintiffs' claims now before the court on motions for summary judgment.

III. Defendant's 2002 Motion

A. Arguments of the Parties

Defendant's 2002 motion relies heavily on the holdings of *Bobo I* and *Bobo II*, and distills from them that

> [t]he premise underlying both opinions was that the mere act of driving a vehicle to and from the workplace did not itself constitute work, and that time spent in this activity would not be compensable unless it involved some additional burdens that were more than *de minimis*.

Def.'s 2002 Mot. at 5-6. This is indeed the controlling law in this circuit, and this premise must be applied to the facts of this case. Plaintiffs' 2002 motion attempts to distinguish *Bobo II* from the instant case, because, plaintiffs assert, "in *Bobo* [*II*] there had never been a 'custom or practice' of paying INS canine handlers for driving." Pls.' 2002 Opp. at 10.

Plaintiffs assert that here, unlike in *Bobo II*, "a 'custom' or 'practice' was in effect at the time such driving was being performed providing for payment by the Government for such activity." *Id.* at 14. Plaintiffs, however, mistake the conditions imposed by the statute for the "custom or practice" limitation on the Portal-to-Portal Act provisions. For plaintiffs' argument to have any force here, plaintiffs must show that there was a "custom or practice" of paying *these plaintiffs* for their commutes. The statute clearly states that for an employee to benefit from the custom or practice limitation on the Portal-to-Portal Act provisions mandating the noncompensability of commuting time, there must be "a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between *such* employee, his agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254(b)(2) (emphasis added). Here, plaintiffs toil to show that other employees were paid for commuting time in government vehicles, but fail to allege that these plaintiffs, or indeed any employees in the same grade levels and position descriptions as these plaintiffs, benefitted from such a custom or practice. Thus, plaintiffs' attempt to distinguish this case

from *Bobo II* fails because there is no genuine issue of material fact regarding a custom or practice concerning these particular plaintiffs.

Defendant argues that federal "agency compliance with the interpretation of FLSA embodied in FPM Letter No. 551-10 ... does not constitute a 'custom or practice' within the meaning of section 254(b)." Def.'s 2002 Reply at 17. This argument echoes the court's concern, as discussed *supra*, that section 254(b) may not be applicable to federal employees, or that special considerations might affect its applicability to federal employees. It is not necessary to reach this issue, however, because the court has found that no custom or practice existed here for compensating the 2002 plaintiffs for their commutes.

The court now turns to the facts of the commutes of the first two groups of plaintiffs, to determine if *Bobo II* can be distinguished or if that holding controls the result here. The court notes that defendant's reliance on *Bobo II* and defendant's assertion that the first two groups of plaintiffs' commuting time involved "even less than *de minimis* " work activity, Def.'s 2002 Mot. at 7, put plaintiffs on notice that the *Reich* analysis and the *de minimis* doctrine would be at issue in this case. To avoid the summary judgment fate of the plaintiffs in *Bobo I*, plaintiffs here must allege facts that would satisfy all of the elements of the *Reich* analysis, so as to show that the driving time by and of itself was inherently compensable, or that plaintiffs' commuting time included more than *de minimis* work activity.

B. Plaintiffs at USSS and USCS at Issue in the 2002 Motion

Defendant asserts that the plaintiffs encompassed by defendant's 2002 motion occupy the following types of positions: marine enforcement officer positions at USCS; and, physical security specialist, telecommunication specialist, fingerprint specialist or document analyst positions at USSS. This assertion is uncontroverted. These job classifications fall within the law enforcement personnel category reviewed in *Reich* and *Bobo I*. The only type of claim addressed in

defendant's 2002 motion is commuting time claims while driving a government vehicle to and from work, as substantiated by the settlement agreements concerning these plaintiffs. This is the type of claim addressed in *Bobo I* and *Bobo II*. Despite plaintiffs' contention that defendant "has submitted no facts, material or otherwise, in support of its motion," Pls.' 2002 Opp. at 2, the court finds that defendant has identified the plaintiffs, claims, and controlling law concerning those claims to a degree sufficient to decide defendant's 2002 motion as a matter of law.

In opposition to defendant's 2002 motion, plaintiffs have submitted Plaintiffs' Statement of Uncontroverted Fact (Pls.' 2002 Facts) and an appendix of exhibits (Pls.' 2002 App.), both of which are almost exclusively devoted to agency policies and procedures concerning the compensation of commuting time, or agency commentary on the FLSA implications of that compensation. There are over three hundred pages in the appendix. Several of the exhibits are internal documents from other federal agencies, not USSS or USCS. No declarations have been submitted from individual plaintiffs whose claims are at issue in the 2002 motion. The lack of specificity of the alleged facts significantly detracts from plaintiffs' ability to support their contentions under the *Reich* standard.

Plaintiffs appear to argue that these plaintiffs' driving time claims are based on situations where the " ' "employee[ ] drives a government vehicle home (as a requirement of the employing agency) to respond to emergency calls from his/her home." ' " Pls.' 2002 Opp. at 9 (quoting *Aguilar v. United States*, 36 Fed. Cl. 560, 567 (1996) (quoting FPM Letter No. 551-10 (1976))). However, nothing in plaintiffs' recitation of facts alleges that this was indeed the situation at USSS and USCS for the concerned plaintiffs.[4] Assuming, *arguendo*,[5] that the court

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[4]A USSS document is quoted which states that certain USSS GS-5 and GS-7 employees may claim work time for when they "drive a Government vehicle to and from work as a requirement of the Secret Service in order to

should infer that the only reasons these plaintiffs at USSS and USCS were issued government vehicles was to have the vehicles readily available for emergency response to agency needs, a fact not alleged by plaintiffs with the specificity necessary to resist summary judgment,[6] the court would follow *Bobo II* and review these commutes for compensability based on the burdens placed on plaintiffs related to emergency response availability, and for compensability based upon any work activities they might have performed during their commutes. If emergency response activities during commuting had been alleged, the court would regard any emergency response activities alleged to have occurred during the commutes as integral and indispensable to plaintiffs' primary work activities, because all favorable inferences are due to the non-movant opposing summary judgment. These emergency response work activities would be compensable if not *de minimis*.

In the 2002 motion evidentiary allegations by plaintiffs,

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respond to emergencies from their residence," but this policy does not allege any facts relevant here. Pls.' 2002 Facts at 3. Similarly, a USCS memo is quoted which states that "[i]n the past, we have authorized certain groups of employees to use G[overnment] O[wned] V[ehicle]s Home to Work in order for them to be available for call outs and to facilitate before and after duty hours activities," *id.* at 10, but again, this statement alleges no facts that are of use to plaintiffs concerning these plaintiffs in particular.

[5]Defendant also appears to make this inference in order to compare plaintiffs' driving time claims with the claims considered in *Bobo II*. *See* Def.'s 2002 Reply at 9 ("Where an employee drives a Government vehicle home in order to have the vehicle available in the event of an emergency, the employee's utilization of a Government vehicle for his commute apparently serves the Government's interest.").

[6]Plaintiffs simply state in their brief that these plaintiffs' "driving is compensable under FLSA," Pls.' 2002 Opp. at 8, and offer citations to OPM guidance and regulations. Plaintiffs do not support this legal conclusion with factual assertions related to the conditions under which they commuted in government vehicles.

there is no evidence of restrictions or burdens on these plaintiffs during their commutes, such as prohibitions on personal stops or a requirement to monitor radio communications. The only burden alleged by plaintiffs, a burden alleged only indirectly through citation to FPM Letter No. 551-10, is that these plaintiffs were required to take government vehicles home to facilitate emergency response from their homes. The *Reich* analysis endorsed by *Bobo II* compels the determination that such minimally-burdened commuting time is noncompensable. Pursuant to the holding of *Bobo II*, the driving time of these plaintiffs is noncompensable because it is not work time.

Plaintiffs do not claim back pay for emergency response activity during their commutes.[7] Even if plaintiffs had presented such a claim, the record is devoid of any facts concerning the regularity, aggregate duration, or time-keeping burden related to any emergency response activities performed by these plaintiffs during their commutes. In the absence of any alleged facts as to compensable work activity occurring during these commutes, plaintiffs have not shown that any work during these commutes was more than *de minimis*. *Bobo I* rejected driving time claims because the facts alleged did not overcome the *de minimis* threshold, and the Federal Circuit affirmed that decision and held that no valid or triable claim remained because the plaintiffs' work had not been shown to be more than *de minimis*. This comports with plaintiffs' burden

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[7]The court asked plaintiffs "[w]hether plaintiffs allege that more than *de minimis* emergency response work occurred during the driving time at issue, and if so, which citations to the record before the court support such an allegation." Order of April 4, 2005 at 2. At oral argument, plaintiffs responded that emergency response work during driving time was not the basis of their driving time claims. *See* Tr. at 29 (Pls.' counsel) ("[W]e're not talking about the time that they may have been riding home and they got a call to go some place on an emergency or otherwise ...."). For further discussion of the scope of plaintiffs' driving time claims, *see infra* note 9 and accompanying text.

under FLSA to prove that compensable work was performed. *See Anderson*, 328 U.S. at 686-87, 66 S.Ct. 1187 ("An employee who brings suit under § 16(b) of [FLSA] for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated.").

Plaintiffs have not adduced facts alleging burdens on their commuting time in government vehicles which would render those commutes compensable. In addition, plaintiffs have not adduced facts alleging that compensable work activities occurred during that commuting time. Thus, plaintiffs' back pay driving time claims preserved by the 1999 and 2000 settlement agreements fail as a matter of law. For these reasons, defendant's 2002 motion is granted.

IV. 2004 Cross-Motions

A. Changes in Settlement Agreement Terms

As an initial matter, the court must address whether the changes in the settlement agreement terms from the 1999 and 2000 agreements to the 2003 agreement make a difference in how the *Reich* analysis must be applied to the 2004 motions as opposed to the 2002 motion. Plaintiffs rely on the new joint stipulation that states that plaintiffs concerned by the 2004 motions were FLSA non-exempt at the times relevant to the driving time issue. Pls.' 2004 Mot. at 3. However, as defendant points out, this does not help plaintiffs to show that there was a custom or practice of compensating these plaintiffs for their commuting time, because "the undisputed fact is that, to the extent that agencies ever followed a practice of compensating agents for home-to-work driving in accordance with FPM Letter No. 551-10, this practice never extended to agents who were, rightly or wrongly, *classified* as exempt from the FLSA [at the time]." Def.'s 2004 Mot. at 33. Thus, the new language in the 2003 settlement agreement is of no avail to plaintiffs in establishing a custom or practice of any relevance to the 2004 motions and does not change the court's

analysis.[8]

Defendant relies on the new language in the 2003 settlement agreement preserving claims " 'based upon time *solely* spent driving to and from work in a government vehicle.' " Def.'s 2004 Mot. at 9 (quoting agreement and putting emphasis on the added word "solely"). In defendant's view, "to the extent that plaintiffs spent time during their commutes performing activities beyond solely driving, those activities do not require additional back pay for that time, but [the settlement agreement terms] preclude [such overtime claims], regardless of whether those activities constituted compensable work and regardless of whether that work was more than *de minimis*. The compensability of time spent by plaintiffs performing these activities is simply not before the [c]ourt." *Id.* Plaintiffs did not respond to this argument in their responsive briefing.

Plaintiffs were invited to respond to this topic at oral argument. Order of April 4, 2005 at 2. At oral argument, plaintiffs agreed with defendant's explanation of the significance of the word "solely." *See* Tr. at 29 (Pls.' counsel) ("[W]e're not talking about the time that they may have been riding home and they got a call to go some place on an emergency or otherwise, we're talking about the driving from home-to-work and from work-to-home so they could have the cars at home to be able to respond to emergencies."). Based on the parties' arguments and the plain meaning of the text of the 2003 settlement agreement, the court agrees that plaintiffs' preserved claims are for driving time which consists solely of transporting the employee, automobile and work-related equipment from home to work and work to home.[9]

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[8]As previously discussed in part III.A of this opinion, on these facts the court need not reach the issue of the applicability of section 254(b) to federal employees.

[9]Defendant's counsel explained that the addition of the word "solely" to the 2003 stipulation was simply to clarify the limited nature of plaintiffs' preserved claims, and that the 1999 and 2000 stipulations were similarly

B. Plaintiffs' Argument that *Bobo II* is Distinguishable or Mistaken

Plaintiffs argue that *Bobo II* is distinguishable on both "facts and legal principles." Pls.' 2004 Mot. at 15. The facts that are alleged to be different are: (1) that FPM Letter No. 551-10 is applicable here and was not in *Bobo II, id.* at 16; (2) that plaintiffs here were commuting in government vehicles to allow for immediate response to emergencies, rather than to transport dogs, *id.;* (3) that the *Bobo II* plaintiffs received some compensation for driving time and dog-care, whereas these plaintiffs did not receive any compensation for commuting time activities, *id.;* (4) that here the claim is not for trivial, *de minimis* dog-care work such as was the case in *Bobo II, id.* at 16-17; and, (5) that a custom or practice existed here of compensating this type of commuting time for other employees, *id.* at 17. Plaintiffs in their reply brief allege an additional factual distinction (6), that a statute, 31 U.S.C. § 1344(a)(2)(B), is relevant to this case but was not addressed in *Bobo II.* Pls.' 2004 Opp. at 23.

The court is unable to discern from plaintiffs' brief exactly which legal principles are different here than in *Bobo II,* but will assume that plaintiffs mean that the allegedly different facts in this case would permit a different legal analysis than the *Reich* analysis employed in *Bobo II.* This possibility is discussed in more detail *infra* in part IV.C of this opinion. Plaintiffs also suggest that if *Bobo II* could be read to preclude

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limited in nature. *See* Tr. at 77 ("I don't think it [the addition of the word "solely"] was intended really to change anything but really to clearly [say] what I believe was intended in all the agreements ...."). Defendant's counsel also stated that any work during commuting time, such as emergency response activity documented as "administratively uncontrollable overtime," had already been paid through settlement. *Id.* at 78. The preserved claims are thus for the commuting time in and of itself. *See id.* (Def.'s counsel) ("All these work-related activities other than driving, that's what we settled. What was left over was the routine commute.") *Id.* Plaintiffs did not challenge this interpretation of the scope of plaintiffs' driving time claims.

the claims here, that *Bobo II* "would be mistaken." *Id.* at 16 n. 5. This court is, of course, bound by the holding in *Bobo II* and cannot consider plaintiffs' suggestion that the Federal Circuit could be mistaken about the law.

1. FPM Letter No. 551-10 at Issue Here but not in *Bobo II*

The relevance of FPM Letter No. 551-10 (FPM Letter) to plaintiffs here is undisputed. Pls.' 2004 Mot. at 4; Def.'s 2004 Reply at 4. This letter, discussed in detail *infra* in part IV.C of this opinion, states that when an "[e]mployee drives a Government vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home [,] ... [a]ll time spent driving the vehicle home to work (work to home) is hours worked." Pls.' 2004 App. Ex. 11 at 547. The opinions in *Bobo I* and *Bobo II* did not discuss FPM Letter No. 551-10. Nevertheless, contrary to plaintiffs' assertion at oral argument, Tr. at 82 (plaintiffs' counsel arguing that "the Federal Circuit did not have before it [FPM Letter No.] 551-10"), the *Bobo* plaintiffs did raise the FPM Letter as support for their commuting time claims.

The trial court in *Bobo I* was presented with arguments concerning the FPM Letter No. 551-10 provision cited above, the provision which authorized compensation for commuting time when a government vehicle was provided in order to facilitate emergency response from the employee's home. Reply Brief for Pls. filed Dec. 31, 1996 at 6, *Bobo I;* Brief for Pls. filed on Sept. 6, 1996 at 7, *Bobo I.* The trial court also had before it the text of FPM Letter No. 551-10, attached as an exhibit to plaintiffs' appendix in support of their cross-motion for summary judgment. Brief for Pls. filed on Sept. 6, 1996 App. at 125, *Bobo I.* In its published opinion, the *Bobo I* court discussed the claims of those plaintiffs for time spent responding to emergency calls from their homes. 37 Fed. Cl. at 703 n. 23. Thus, although it was never specifically discussed by the court, FPM Letter No. 551-10 and its implications were considered by the court in *Bobo I.* On appeal, the border patrol agents also argued for compensability based on emergency

response availability and provided a copy of FPM Letter No. 551-10 in their appendix. Brief for Appellants filed Aug. 25, 1997 at 8, 17, App. at 57, *Bobo II* (1997 WL 33544216).

Even though the relevant provision of FPM Letter No. 551-10 concerning compensation for commutes related to emergency response availability was considered in *Bobo I* and was before the Federal Circuit in *Bobo II*, plaintiffs are correct in asserting that there is a "variance" between *Bobo II* and this case in the importance of FPM Letter No. 551-10. Pls.' 2004 Mot. at 15. In *Bobo II*, the government "provided ... specially equipped vehicles to transport the dogs between their homes and Border Patrol offices or other work locations." 136 F.3d at 1467. Here, plaintiffs allege that the "principal reason that the GS-12 plaintiff criminal investigators ... were required to drive their government cars between home and work was so that they could 'respond to emergency calls immediately from ... home.' " Pls.' 2004 Mot. at 16 (quoting FPM Letter No. 551-10). While the plaintiffs in *Bobo II* had emergency-response-from-home claims, these were not the primary claims considered by the Federal Circuit, and were not even mentioned in the appellate decision. At the trial level, the emergency response claims merited only a portion of a footnote. *Bobo I*, 37 Fed. Cl. at 703 n. 23. From this record, it is clear that in *Bobo II*, the government vehicles were primarily for the transportation of dogs and not primarily to obtain emergency response availability from employees' homes.

Here, FPM Letter No. 551-10 is central to plaintiffs' argument of compensability, because emergency response availability is alleged to be the primary reason for their commuting in government vehicles. Defendant implicitly acknowledges the importance and relevance of the FPM Letter to plaintiffs' case here, as contrasted with its minor importance in *Bobo II*:

> [A]part from plaintiffs' arguments based upon FPM Letter No. 551-10, plaintiffs make no arguments here that could not as readily be made with respect to the driving

performed by the INS agents in *Bobo* [*II*].

Def's 2004 Reply at 4. For this reason, the court must examine whether the importance of FPM Letter No. 551-10 in this case makes *Bobo II* distinguishable, as plaintiffs assert, Pls.' 2004 Mot. at 15-16, or whether the statutory interpretation in FPM Letter No. 551-10 is "at odds" with *Bobo II*, as defendant asserts, Def.'s 2004 Reply at 4. This issue is discussed *infra* in part IV.C of this opinion.

2. Vehicles for Emergency Response, Not Dog Transportation

Plaintiffs point out that there are factual differences between the commutes of the border patrol agents in *Bobo II* and the commutes of plaintiffs here, because plaintiffs were not transporting dogs; instead, they were issued vehicles " 'to respond to emergency calls immediately from ... home.' " Pls.' 2004 Mot. at 16 (quoting FPM Letter No. 551-10). This factual distinction is not material to the analysis of compensability of commuting time claims, however. The same *Reich* analysis applies to each commuting time pay claim, despite factual differences, to determine whether or not the employee is working for the employer during the commute. *See Bobo I*, 37 Fed. Cl. at 695 n. 7 (noting that normal commuting time is noncompensable under the Portal-to-Portal Act, but because "employee commutes entailing substantial work differ from normal commutes," stating that the Portal-to-Portal Act exception to compensability "is inapplicable to commutes during which employees perform work for their employers").

If the "work" during commuting time meets the *Reich* standard, the time spent on that work is compensable if not *de minimis*. This court must apply the *Reich* analysis to fact scenarios that do not perfectly mirror the commuting time claims of dog-handler agents, because the elements of that analysis are applicable, whether there is a dog in the car or not. As previously stated, *Bobo II* adopted the *Reich* analysis and *Bobo II* is controlling law which cannot be ignored by this court.

The analysis begins with a determination of the employee's principal work activity. The court then examines whether the work alleged to have occurred during the commute is "integral and indispensable" to the employee's principal activity. In *Bobo II* and here, the employees were or are law enforcement personnel commuting in government vehicles. The principal activities of plaintiffs here are discernable, and the analysis of the commuting time activities under the "integral and indispensable" standard is perfectly analogous to the analysis in *Bobo II*. The court finds nothing in the facts of this case which would prevent the application of the *Reich* analysis.

The court also notes that many of the claimed burdens or work activities alleged to have occurred during the commutes in *Bobo II* are identical to the government-imposed burdens on commuting alleged in this case. Both the *Bobo II* plaintiffs and these plaintiffs were prohibited from making personal stops during their commutes in government vehicles. *Bobo II*, 136 F.3d at 1468; Pls.' 2004 Mot. at 7. Monitoring the vehicle radio was one of the burdens alleged in *Bobo II*, 136 F.3d at 1468, and is a burden alleged here, Pls.' 2004 Mot. at 7. Responding to emergency calls was alleged to be a compensable work activity in *Bobo I*, 37 Fed. Cl. at 703 n. 23, and emergency response availability is cited here as one of the reasons why these plaintiffs are commuting in government vehicles, Pls.' 2004 Facts ¶ ¶ 15, 90-91, 139, and as a rationale for why these commutes constitute compensable work time, Pls.' 2004 Mot. at 6, 8. These factual similarities make it clear that the reasoning of *Bobo II* should be applied to this case.

3. The *Bobo II* Plaintiffs Received Compensation for Some Duties Performed at Home or During Commuting Time Periods

Plaintiffs point out that the *Bobo II* plaintiffs received compensation for dog-care activities performed at home. Pls.' 2004 Mot. at 16. The *Bobo I* court noted that each dog-handler agent was paid for one hour of daily work at home to take care of the dog. 37 Fed. Cl. at 702 n. 21. But except for one type of

dog-care activity, the cleaning of the portable dog kennels,[10] the court did not apply the daily one hour of pay to any of the dog-care activities that were alleged to have occurred during the agents' commuting time. *Id.* at 702. There is no indication in *Bobo I* or *Bobo II* that dog-care activities which occurred during commuting time were found to be noncompensable because of compensation received for dog care at home. That compensation was irrelevant to the court's *Reich* analysis because it did not concern the commuting time work alleged to be compensable.

Plaintiffs also point out that the *Bobo II* plaintiffs received compensation for emergency response activities performed during commuting time periods. Pls.' 2004 Mot. at 16. This fact must be put in context. First, the *Bobo I* court held that emergency response activity during the agents' commutes had not been shown to be more than insubstantial in order to overcome the *Lindow de minimis* threshold. 37 Fed. Cl. at 702-03. The *Bobo I* court then noted that certain dog-handler agents, those who had alleged the most frequent emergency response activity, had received " 'administratively uncontrollable overtime' pay whenever they respond[ed] to emergency calls while commuting." *Id.* at 703 (quoting plaintiff declarations in that case). This was not an element of the *Reich* analysis of compensable work activities, however. Instead, the court stated that it "cannot discern any rationale for paying plaintiffs for tasks that they already receive compensation for performing." *Id.* The court expressed a concern for and barred double recovery for what might otherwise have been compensable work time.

Here, there is a similar concern that plaintiffs have already received compensation by way of the 2003 settlement

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[10]The court found that kennel cleaning was not performed while driving, and that this cleaning was one of the activities that occurred after or before commuting which were already compensated by the one hour's pay allotted daily for dog care. *Bobo I*, 37 Fed. Cl. at 702 & n. 21.

agreement for any emergency response activities that might have occurred during commuting. Tr. at 29, 77-79. This interpretation of the 2003 settlement agreement was uncontroverted by plaintiffs. If plaintiffs were now pursuing overtime pay for work during commuting other than simply driving, the same "double recovery" concern expressed in *Bobo I* would be present here. However, the only claims plaintiffs are pursuing in their 2004 motion are for time solely spent driving while commuting in government vehicles, and to these claims the court need only apply the *Reich* analysis. The *Reich* analysis was also determinative in *Bobo I* and *Bobo II*.

The compensation practices discussed in *Bobo I*, although factually distinguishable from this case, do not diminish the applicability of the *Reich* analysis utilized in *Bobo I* and *Bobo II*.

4. The "Trivial" Nature of the Dog-Care Duties Claims in *Bobo II*

Plaintiffs attempt to distinguish *Bobo II* from this case by stating that "the *Bobo* [*II*] plaintiffs sought compensation for time spent on fairly trivial activities such as allowing their dogs to relieve themselves during commutes, clearly an irregular activity consuming very little time in the aggregate that would be extremely burdensome to record and review," and by contrasting those claims with plaintiffs' assertion that "[h]ere there is no question that [the compensable] travel time of [these] FLSA non-exempt plaintiffs was (1) easily determined and recordable; (2) substantial; and (3) a regular part of the working life of the plaintiffs." Pls.' 2004 Mot. at 16-17. Although the decision in *Bobo II* did discuss certain dog-care activities that would be compensable if not *de minimis*, 136 F.3d at 1468, the claims of the *Bobo II* plaintiffs were for the entire commuting time and were founded not just on the dog-care duties, but were also argued to be compensable because of other duties and burdens related to their principal activity of enforcing immigration laws, *see Bobo I*, 37 Fed. Cl. at 699 (noting that those "plaintiffs claim[ed] to ... listen[ ] to and

sign[ ] off and on their vehicle radios, observ[e] traffic, and look[ ] out for suspicious activity [throughout their commutes,] [i]n an effort to render the entire duration of their commutes compensable"). Because the *Bobo II* plaintiffs claimed that their entire commuting time was compensable, and because plaintiffs here also claim that their entire commuting time is compensable, there is no factual difference between *Bobo II* and this case related to the scope of the driving time claims alleged.

5. A Custom or Practice Existed Here of Compensating This Type of Commuting Time for Other Employees, but no Such Practice was the Case in *Bobo II*

As discussed *supra* in parts III.A and IV.A of this opinion, the custom or practice alleged by plaintiffs here of compensating non-exempt GS-5 and GS-7 law enforcement employees in some[11] federal agencies for their commuting time in government vehicles does not establish a custom or practice of any relevance to the 2004 motions. Plaintiffs here are GS-12 employees of the five concerned agencies. The statute only creates compensability by reason of custom or practice for those employees who directly benefitted from that custom or practice. 29 U.S.C. § 254(b)(2). Plaintiffs have alleged no facts from which it could be inferred that plaintiffs concerned by the 2004 motions were at any time the beneficiaries of a custom or practice of compensated commuting time. Because there is no relevant custom or practice here, and there was no relevant custom or practice addressed in *Bobo II*, *Bobo II* is indistinguishable on the basis of customs and practices of

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[11]Defendant contests this assertion as it applies to IRS and DEA, stating that "the evidence offered by plaintiffs establishes that at least two of the agencies involved [in the 2004 motions] did not pay their agents for home-to-work driving during the times in question, even when the agents were nonexempt." Def.'s 2004 Mot. at 32 (citing Pls.' 2004 App. at 108-09, 404-07).

compensable commutes.[12]

6. 31 U.S.C. § 1344(a) (2000)

Plaintiffs allege that *Bobo II* is distinguishable from this case because 31 U.S.C. § 1344(a)(2)(B) was not "at issue in *Bobo* [*II*]." Pls.' 2004 Opp. at 23. It is unclear whether plaintiffs mean to argue that this statutory provision was not applicable in *Bobo II*, or whether its significance was not raised by the parties in that case. The court will address both arguments.

The relevant language of section 1344(a) is reproduced here:

> (a)(1) Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose.
>
> (2) For purposes of paragraph (1), transportation between the residence of an officer or employee and various locations that is-
>
> (A) required for the performance of field work, in accordance with regulations prescribed pursuant to subsection (e) of this section, or
>
> (B) essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties,
>
> is transportation for an official purpose, when approved in

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[12] As previously discussed in part III.A of this opinion, on these facts the court need not reach the issue of the applicability of section 254(b) to federal employees.

writing by the head of the Federal agency.

31 U.S.C. § 1344(a). Section (g)(1) of the statute defines "passenger carrier" to include "a passenger motor vehicle ... that is owned or leased by the United States Government." *Id.* § 1344(g)(1).

It is true that section § 1344(a)(2)(B) was not discussed in either *Bobo I* or *Bobo II*. It is not true, however, that section § 1344(a)(2)(B) did not have applicability to the government vehicle use of the *Bobo II* plaintiffs, in exactly the same way this section has applicability to the government vehicle use of plaintiffs here. The statute states that the expenditure of federal funds for government vehicles for the home to work travel of federal employees is permissible if "essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties," and that this use constitutes "transportation for an official purpose." 31 U.S.C. § 1344(a). This restriction on federal funds, and the authorized expenditure exception to this restriction, applies equally to border patrol agents in the *Bobo II* case and to plaintiffs here.

If indeed section 1344(a)(2)(B) was not raised by the parties in *Bobo I* and *Bobo II*, plaintiffs might be proposing, although it is not clear from their brief, that *Bobo II* could have been decided differently if this statute were part of the analysis. This argument would fail, however, because section 1344(a)(2)(B) is not relevant to the FLSA claims in *Bobo II* or here. The court has found no case that applied 31 U.S.C. § 1344(a)(2)(B) to the commuting time overtime pay claims of federal law enforcement personnel. Section 1344(a) does not appear to have any cross-references to FLSA provisions. Plaintiffs have shown no connection between the "essential" and "official purpose" requirements for the use of a government vehicle for commuting found in section 1344(a), and the FLSA determination of whether that commuting time would be compensable work time.

Because plaintiffs have not shown the relevance of section

1344(a)(2)(B) to the claims here or to the claims in *Bobo II*. *Bobo II* is not distinguishable on the grounds that in *Bobo II* the Federal Circuit failed to discuss this statutory provision.

C. The OPM Interpretation of FLSA and the Portal-to-Portal Act Compared with the *Bobo II* Court's Interpretation of These Statutes

1. FPM Letter No. 551-10

Although FPM Letter No. 551-10 is directly on point and in support of plaintiffs' claims here for compensable driving time, it is far from certain that the *Bobo II* court would have deferred to the FPM Letter's guidance in interpreting FLSA and the Portal-to-Portal Act, had emergency response availability been the primary reason for the commutes in government vehicles of the border patrol agents in that case. First, the *Bobo II* court was following the guidance of a sister circuit in applying the *Reich* analysis to a commuting time claim. 136 F.3d at 1468. The Federal Circuit has stated that

> [a]s a general matter, we "do not create conflicts among the circuits without strong cause." We adhere to this view because "federal law (unlike state law) is supposed to be unitary."

Wash. Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir.1996) (citations omitted).

The Second Circuit in *Reich* stated that "to resolve the[se commuting time claims], it is necessary to return to the basic principle that underlies the FLSA: Employees are entitled to compensation only for 'work.' " 45 F.3d at 651. Quoting *Tennessee Coal*, 321 U.S. at 598, 64 S.Ct. 698, the *Reich* court defined work as "an activity ... ([that is] compensable under the FLSA) if it involves 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' " 45 F.3d at 651. Applying this principle to canine unit officers and their commutes in that case, the Second Circuit decided that "[h]ere, however, the

activity of commuting involved neither exertion nor loss of time." *Id.* For these commutes which demanded no extra exertion or extra time because of employer requirements, the *Reich* court stated that "[w]e therefore conclude that the time spent by the handlers driving to and from work with their dogs, except to the extent that actual duties of care, feeding, training, walking or cleaning up occur during such commute, is not compensable work." *Id.* at 652.

This conclusion in *Reich* is in direct conflict with FPM Letter No. 551-10. The FPM Letter suggested that the simple act of driving a government vehicle from home to work and work to home, with no extra effort or extra time affecting the commute, if done for the purpose of facilitating potential emergency response from employees' homes, was compensable under FLSA. The Federal Circuit would not have lightly decided to reject the conclusion of a sister circuit in favor of the guidance in FPM Letter No. 551-10.

Second, the holding in *Reich* depended on a carefully reasoned interpretation of FLSA and the Portal-to-Portal Act and Supreme Court precedent, all of which are binding on this court and the Federal Circuit. In *Bobo II*, the Federal Circuit examined commuting time claims under these precedents, and pursuant to the standard of review for summary judgment stated that "we accept as true that the restrictions placed upon the INS Agents' commutes are compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities." 136 F.3d at 1468. Despite these characteristics which would otherwise render work performed during the commutes compensable, the *Bobo II* court held that "the burdens alleged are insufficient to pass the *de minimis* threshold." *Id.* (citing *Anderson*, 328 U.S. at 692, 66 S.Ct. 1187). This holding in *Bobo II* is also in direct conflict with the FPM Letter's guidance, which suggested that the mere act of commuting in a government vehicle, if that commute was for the purpose of fostering emergency response availability from the employee's home, is compensable under FLSA even if no

burdens beyond the minor restrictions commented on in *Bobo II* have been imposed and no work was done during the commute.

Therefore, the court agrees with defendant's position that rather than distinguishing *Bobo II*, the fact that FPM Letter No. 551-10 is of greater importance and relevance to the claims in this case simply means that the FPM Letter's interpretation of FLSA and the Portal-to-Portal Act is in opposition to the *Bobo II* court's interpretation of those same statutes. Plaintiffs recognize, at least implicitly, that this court is bound by the holding in *Bobo II*, by stating that plaintiffs agree with defendant's recognition that "if OPM's position is not inconsistent with *Bobo* [*II*], it is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) [(*Chevron*)]." Pls.' 2004 Opp. at 23. Although the question of the level of deference that should be given an FPM letter such as the one at issue here is an interesting one,[13] this court is precluded from that inquiry because FPM Letter 551-10 is at odds with the controlling law in this circuit.

Plaintiffs also allege that a variety of regulations, not just FPM Letter No. 551-10, support compensability of the commuting time claims here. Plaintiffs' citations to

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[13]As the Supreme Court noted in *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), "an interpretation contained in an opinion letter [is] not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference." Although some deference would be given to an OPM or FPM letter concerning FLSA compensability, these letters would not be given *Chevron*-style deference. *See Christofferson v. United States*, 64 Fed. Cl. 316, 322 (2005) (citing *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655, in support of the deference this court accorded to FPM Letter No. 551-24 (1992) and for the proposition that "agency interpretations in opinion letters are not entitled to *Chevron*-style deference but may be used as persuasive authority").

regulations include 5 C.F.R. § § 551.401, 551.422 and 29 C.F.R. § 785.11. However, none of these regulations are directly on point for the commuting time claims alleged here. Although plaintiffs attempt to connect the guidance of FPM Letter No. 551-10 and these regulations in order to show that the FPM Letter "provisions were incorporated into the regulations, handbooks and manuals of agencies involved in this case," Pls.' 2004 Mot. at 4, the court has found no evidence that the relevant provisions of FPM Letter No. 551-10 have been incorporated into the Code of Federal Regulations.[14] Plaintiffs have not shown that OPM regulations interpret FLSA to provide compensation for the commuting time claims asserted here. To the extent that FPM Letter No. 551-10 could be considered to have had the force and effect of an OPM regulation, the FPM Letter provision concerning commuting time pay cited by plaintiffs cannot stand against the Federal Circuit's controlling statutory interpretation of FLSA and the Portal-to-Portal Act issued in *Bobo II. See R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1324 (Fed. Cir.2003) ("A regulation that contravenes a statute is invalid.") (citations omitted).

2. Current OPM Guidance on Commuting Time Claims Related to Emergency Response Availability From Employees' Homes

The OPM website currently offers a different interpretation of FLSA than the one expressed in FPM Letter No. 551-10:

> Commuting Time
>
> For FLSA-covered employees, normal commuting time from home to work and from work to home is not hours of work. (See 5 C[.]F[.]R[.] [§] 551.422(b).) However, commuting time may be hours of work to the extent that

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[14]FN14. The FPM Letter was referenced, however, in the Federal Register, as providing "in depth instructions, with examples, on how the rules [for compensable travel time] are to be applied under [FLSA]." 45 Fed.Reg. 85,659, 85,661 (Dec. 30, 1980).

> the employee is required to perform substantial work under the control and direction of the employing agency-i.e., productive work of a significant nature that is an integral and indispensable part of the employee's principal activities. The fact that an employee is driving a Government vehicle in commuting to and from work is not a basis for determining that commuting time is hours of work. (See *Bobo* decision cited in the References section[, which cites to *Bobo II,* and notes that *Bobo II* affirmed *Bobo I*].)
>
> Similarly, for FLSA-exempt employees, normal commuting time from home to work and from work to home is not hours of work. (See 5 C[.]F[.]R[.][§] 550.112(j)(2).) However, commuting time may be hours of work to the extent that the employee is officially ordered or approved to perform substantial work while commuting.

OPM website, "Hours of Work for Travel" page, found at http:// www.opm.gov/oca/worksch/html/travel.asp, last visited April 19, 2005. OPM appears to now have adopted *Bobo II* as the controlling interpretation of commuting time claims under FLSA. For these reasons, the court may not apply the guidance of FPM Letter No. 551-10 in the stead of the *Reich* analysis in *Bobo II.*

D. Alleged Facts of the Parties in the 2004 Motions

Defendant asserts that the plaintiffs encompassed in its 2004 motion are "GS-12 criminal investigators with the Bureau of Alcohol, Tobacco and Firearms ('BATF'), the Drug Enforcement Administration ('DEA'), the Internal Revenue Service Criminal Investigation Division ('IRS-CID'), the Customs Service [USCS], and the Secret Service [USSS]." Def.'s 2004 Facts ¶ 1. This assertion is uncontroverted. These positions fall within the law enforcement personnel category reviewed in *Reich* and *Bobo I.* The only type of claim addressed in defendant's 2004 motion is commuting time claims for " 'time spent *solely* driving' " a government vehicle

to and from work, as substantiated by the 2003 settlement agreement concerning these plaintiffs. *Id.* ¶ 2 (quoting 2003 settlement agreement, emphasis added by defendant). This is a type of claim addressed in *Bobo I* and *Bobo II*. Despite plaintiffs' contention that defendant "has submitted *no facts* in support of its motion," Pls.' 2004 Opp. at 33, the court finds that defendant has identified the plaintiffs, claims, and controlling law concerning those claims to a degree sufficient to decide defendant's 2004 motion as a matter of law.

Plaintiffs, for their part, allege facts sufficient to show that emergency response availability is the reason why at least some of the plaintiffs concerned by plaintiffs' 2004 motion commuted in government vehicles. Pls.' 2004 Facts ¶ ¶ 15, 90-91, 139. Plaintiffs also offered factual allegations concerning the burdens on plaintiffs while driving government vehicles to and from work, such as the requirement for monitoring vehicle radios, *e.g.*, *id.* ¶ ¶ 27, 90, and the prohibition on personal stops during the commute, *e.g.*, *id.* ¶ ¶ 95, 142. Just as the plaintiffs in *Bobo II* *241 had to transport dogs from home to work, plaintiffs here are alleged to transport a variety of law enforcement equipment in the government vehicles. *E.g.*, *id.* ¶ ¶ 39-42, 108. However, none of the burdens alleged here exceed the burdens on plaintiffs' commutes in *Bobo II*. Rather, when all favorable factual inferences are given plaintiffs, the burdens here are, if anything, less onerous than transporting a dog in a portable dog kennel, as was the case in *Bobo II*.

Under the controlling law of this circuit, plaintiffs' commutes, by and of themselves, are not compensable merely because they take place in a government vehicle and facilitate emergency response from the plaintiffs' homes. But for the stipulation in the 2003 settlement agreement limiting claims to "time solely spent driving," plaintiffs might have asserted that compensable work occurred during their commutes, but they could not and have not done so. Even if this type of claim had been preserved, no evidence of otherwise compensable work

frequency, duration, or record-keeping difficulties was submitted by plaintiffs-thus, plaintiffs could not meet the *de minimis* threshold requirement established by *Bobo II* for commuting time claims. Because the facts necessary to support the elements of a successful commuting time claim have not been alleged by plaintiffs, plaintiffs cannot resist summary judgment in favor of defendant. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548.

Plaintiffs' 2004 motion must be denied. Plaintiffs' burden was to prove that compensable work under FLSA was performed and that this work was not compensated. *See Anderson*, 328 U.S. at 686-87, 66 S.Ct. 1187 ("An employee who brings suit under § 16(b) of [FLSA] for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated."). Plaintiffs have not alleged facts sufficient to show that summary judgment is warranted as a matter of law for their commuting time claims.

Plaintiffs 2004 motion on the driving time issue is denied, and defendant's 2004 motion on the driving time issue is granted.

CONCLUSION

For these reasons, it is hereby ORDERED that:

(1) Defendant's Motion for Partial Summary Judgment of August 12, 2002 is GRANTED. Plaintiffs' Motion for Partial Summary Judgment Regarding the "Driving Time" Issue of August 2, 2004 is DENIED, and Defendant's Cross-Motion for Partial Summary Judgment of September 22, 2004 is GRANTED.

(2) Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

06-5040, -5041

STEPHEN S. ADAMS, et al.,

Plaintiffs-Apellants,

UNITED STATES,

Defendant-Appellee

ORDER

NOTE: This order is nonprecedential

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant,* and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been refeerred to the panel that heard the appeal, and thereafter the petition for rehwaring en banc and response having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION WHEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the petition for reharing en banc bbe, and the same hereby is, DENIED

The mandate of the court will issue on March 21, 2007

FOR THE COURT,
/s/
Jan Horbaly
Clerk

Dated: 3/14/07

cc: Jules Bernstein
Shalom Brilliant
Lawrence Berger

*The Federal Law Enforcement Officers Association fiuled an amicus curiae brief.

29 U.S.C. § 254.

§ 254 Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947--

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such

employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either--

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

* * * *

Federal Personnel Manual System Letter No. 551-10

PUBLISHED IN ADVANCE OF INCORPORATION
IN FPM CHAPTER 551
RETAIN UNTIL SUPERSEDED
UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL PERSONNEL MANUAL SYSTEM
LETTER

Washington, D.C. 20415
April 30, 1976

FPM LETTER NO. 551 - 10

SUBJECT: Travel Time as "Hours of Work" Under FLSA

Heads of Departments and Agencies:

1. This is another in a series of FPM letters pertaining to the Fair Labor Standards Act, mentioned in FPM Letter 555-1, May 15, 1974.

2. One of the major changes introduced by the FLSA is the nature of the criteria to be used in determining what periods of time spent by non-exempt employees will be considered "hours of work" for compensation purposes. One issue of primary concern for Federal employees is travel time as "hours of work" under FLSA. This issue is discussed in detail in attachment 1 to this FPM letter.

3. Various subject areas concerning time spent traveling are addressed in the attached instructions under FLSA that have not been specifically addressed under title 5 However, one common subject area that is addressed under both statutes is time spent traveling away from official duty station. Under both statutes, all such travel during regular working hours is considered "hours of work." However, time spent traveling away from official duty station that occurs outside regular working hours is treated differently under the two statutes. In general, authorized travel time outside regular working hours is "hours

of work" under FLSA if an employee (1) performs work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonwork days during hours which correspond to his/her regular working hours. Thus, whether time spent traveling outside regular working hours is considered "hours of work" under FLSA depends upon the kind of travel involved* * * *

* * * *

4. Effective Date. The instructions in attachment 1 to this FPM Letter are effective as of May 1, 1974; the effective date for coverage of Federal employees under the FLSA. Initial instructions concerning "hours worked" under FLSA were contained in attachment 4 to FPM Letter 551 - 1. These initial instructions addressed the treatment of time spent traveling by nonexempt employees during regular working hours on regular workdays and during corresponding hours on nonwork days. Furthermore, it was noted in FPM Letter 551 - 1 that the examples for determining "hours worked" under FLSA were not intended to be all inclusive; that accurate records concerning the hours worked by nonexempt employees be maintained; and that additional instructions would be forthcoming in supplemental issuances. All travel time by nonexempt employees on or subsequent to May 1, 1974, that meets the conditions specified within the attached instructions shall be considered as hours of work and necessary recomputations shall be made to determine any additional overtime pay entitlements under FLSA.

/s/
Raymond Jacobson
Executive Director

Attachment to FPM Ltr. 551- 10

TRAVEL TIME AS "HOURS OF WORK" UNDER FLSA

The instructions which follow apply only to time spent traveling by nonexempt employees under the FLSA. Existing rules applicable to time spent traveling by employees (both exempt and nonexempt) under title 5 (or other appropriate statute or regulations) continue in effect without change.

A. INTRODUCTION

Whether time spent in authorized travel by a nonexempt employee is to be considered hours of work under the FLSA depends upon the kind of travel involved. This instruction contains basic principles for determining whether travel time is properly considered "hours of work" under the FLSA when the travel is:

- From home to work (work to home);
- Within the limits of the employee's official duty station;
- Away form official duty station and the travel involves the performance of work while traveling (including travel as a driver of a vehicle); and
- Away from official duty station as a passenger in a public or private conveyance. A further consideration for determining hours worked for travel as a passenger is whether the employee travels to and returns from a temporary duty station during the same day or whether the employee remains overnight at the temporary duty station.

It is intended that the following basic principles, together with the examples in tables 1 through 4, will provide sufficient basis for sound determinations as to whether time spent traveling by nonexempt employees should be considered hours of work under the FLSA.

* * * *

C. HOME TO WORK TRAVEL (See table 1.)

Travel by an employee to and from work before and after the regular workday is a normal incident of employment. Normal travel from home to work is not counted as hours worked. However, there are certain situations where an employee may perform an activity as a requirement of his/her employing agency while traveling from home to work that could result in such travel time being considered hours worked. See table 1 for examples of home to work travel as "hours worked" under FLSA.

D. TRAVEL WITHIN THE LIMITS OF THE OFFICIAL DUTY STATION (See table 2.)

* * * *

E. TRAVEL AWAY FROM OFFICIAL DUTY STATION

1. Work Performed While Traveling (See table 3.) Any work which an employee is required to perform while traveling shall be counted as hours worked. An employee required to drive a vehicle, pilot an aircraft, or (in circumstances to which the seaman exemption does not apply) pilot a boat to a given destination at the request and on behalf of the employing agency is working while traveling and shall have such travel time counted as hours worked. Furthermore, any other employee required to perform work while traveling shall have the time spent traveling counted as hours worked. Bona fide meal periods are deducted from hours worked. Furthermore, under certain conditions sleeping periods or periods when an employee is relieved from duty are not included in hours worked (see notes 1 and 2, below). See table 3 for examples of work performed while traveling away from official duty station as "hours of work" under FLSA.

* * * *

2. Travel as a Passenger on a One-Day Assignment (See table

4.)

Travel as a passenger to and returning from a temporary duty station outside the limits of the official duty station during the same day si viewed as a part of the employee's principal duties for that particular day. The time spent in authorized travel as a passenger (by common carrier or by automobile) during the one-day assignment is considered working time. Bona fide meal periods are deducted from hours worked. Normal home to work (work to home) travel and time spent waiting at a common carrier terminal in excess of normal waiting time which occur outside regular working hours are not included in hours worked. See table 4 for examples of travel as a passenger on a one-day assignment away from official duty station as "hours of work" under FLSA.

* * * *

3. Travel as a Passenger That Keeps an Employee Away from Official Duty Station Overnight.

* * * *

F. SPECIAL SITUATIONS

1. Travel by Mode of Transportation Other Than That Selected by the Employing Agency.

* * * *

2. Travel at a Time Other Than That Selected by the Employing Agency.

* * * *

3. Travel Which Involves Two or More Time Zones.

* * * *

Table 1 HOME TO WORK TRAVEL AS "HOURS OF WORK" UNDER FLSA

Kind of Travel Involved:	Is travel time "hours of work" ?
A. Home to Work - Normal Situation	
Normal home to work (work to home) travel	No
Employee drives a Government vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home.	Yes [1]
Employee drives a Government vehicle home (as a requirementf the employing agency) to transport other employees home to work (or job site).	Yes [1]
Employee reports at a designated meeting place and drives a vehicle (as a requirement of the employing agency) to transport other employees or equipment to a job site.	Yes [2]
Employee reports at a designated meeting place and is transported (as a passenger) by Government vehicle to a job site	No
Employee reports at a designated meeting place (receives instructions, performs other work, or picks up and carries tools) and is transported As a passenger) by Government vehicle to a job site.	Yes [2]

B. Home to Work - Emergency Situation

Employee (at home) receives an emergency call outside regular working hours to return (travel) to normal duty location (or another job site within the limits of the official duty station.).	No
Employee (at home) receives an emergency call outside regular working hours to travel to a temporary duty station (outside the limits of the official duty station) and the distance traveled is greater than normal home to work travel.	Yes [3]

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[1] All time spent driving the vehicle home to work (work to home) is hours worked.

[2] The travel from home to the designated meeting place (and return) is normal home to work travel. However, the performance of work or other activity which is an integral part of the employee's job (e.g., picking up tools or receiving instructions) at the designated meeting place constitutes the commencement of the employee's workday. All subsequent travel (to a job site and return) is hours worked.

[3] If the distance to the temporary duty location (outside the limits of the official duty station) is in excess of the distance from the employee's home to normal duty location, the entire time spent traveling from the employee's home to the temporary duty location and return is hours worked. Conversely, if the distance to the temporary duty location is equal to or less than the distance from the employee's home to normal duty location, the time spent traveling to the temporary duty location and return is not hours worked.

DEPARTMENT OF LABOR REGULATIONS

29 C.F.R. § 785.35 Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C.A. 10, 1944))

785.41 Work performed while traveling.

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except

during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

29 C.F.R. § 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interrelated parts of the entire statutory scheme for the establishment of basic fair labor standards. The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act. But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy. The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein. Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act" that it "protects the legitimate claims" under that act, and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act." It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and

unmistakably within (the) terms and spirit" of such an exemption.

[Footnotes Omitted]

§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on

the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period * * * * If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time.

[Footnotes Omitted]

§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section. On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday. And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked

under the Fair Labor Standards Act, if it would not be so counted under the latter act alone.

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours. For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel

from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers. In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of

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[47]Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions. This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.

[Footnotes Omitted]

29 C.F.R. § 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in

performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform"; they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act. Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade." The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill. They are the following:

[Footnote: (1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the

principal activity, and are included within such term]

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

[Footnotes Omitted]

U.S. Dept of Labor, Wage and Hour Div., Field Operations Handbook,

31d SPECIAL PROBLEMS

31d00 Ambulance Services

(a) Numerous hours worked questions may arise with respect to employees engaged in ambulance services. The most common are these:

* * * *

(5) Employee who takes ambulance to his home. In the ordinary case where an employer permits an employee to drive an ambulance to and from his home for the employee's own convenience, the time so spent is not hours worked. If the employee is required to take the ambulance home in order to respond to calls immediately, all the time spent in driving would be hours worked * * * The time the ambulance spends parked idly outside the employee's residence, and the employee is free to engage in his own pursuits subject only to the understanding that he will leave word at his home or with company officials where he may be reached, would not be regarded as hours worked under the Act. * * * * If the ambulance is parked at the employee's home, the employee would be considered working from the time he sets out on call until the time he returns to his home.

OPM REGULATIONS

5 C.F.R. § 551.401 Basic Principles

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

5 C.F.R. § 551.422 Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

No. 07-116

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' home-to-work commutes in government-owned vehicles are compensable work under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, and Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a).

2. Whether Section 4(b)(2) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(b)(2), entitles petitioners to compensation for their home-to-work commutes based on a "custom or practice" of compensating home-to-work driving of other types of employees who, unlike petitioners, were not classified as exempt from the Fair Labor Standards Act of 1938.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 391 F.3d 1212 (Fed. Cir. 2004), cert. denied, 546 U.S. 811 (2005) 17

Aiken v. *City of Memphis*, 190 F.3d 753 (6th Cir. 1999), cert. denied, 528 U.S. 1157 (2000) 9

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 8, 12

Baker v. *Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998) 14, 15

Becker v. *Montgomery*, 532 U.S. 757 (2001) 19

Bobo v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998) 5, 6, 8, 9, 10, 13

Bonilla v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007), petition for cert. pending, No. 07-554 (filed Oct. 25, 2007) 14

Bowles v. *Russell*, 127 S. Ct. 2360 (2007) 19

DA&S Oil Well Servicing, Inc. v. *Mitchell*, 262 F.2d 552 (10th Cir. 1958) 14, 15

Dole v. *Flint Eng'g & Constr. Co.*, 914 F.2d 262 (9th Cir. 1990) 15

IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) 2, 7, 12

Cases—Continued Page

Mitchell v. *Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961) 14
Nebblett v. *OPM*, 237 F.3d 1353 (Fed. Cir. 2001) 16
Reich v. *New York City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995) 6, 8, 9, 11
Secretary of Labor v. *E.R. Field, Inc.*, 495 F.2d 749 (1st Cir. 1974) 14
Steiner v. *Mitchell*, 350 U.S. 247 (1956) 6, 7, 10, 12
Tennessee Coal, Iron & R.R. Co. v. *Muscoda Local No. 123*, 321 U.S. 590 (1944) 11
United Transp. Union Local 1745 v. *City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999) 14
Wisconsin Dep't of Revenue v. *William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) 13

Statutes, regulations and rules:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 2
29 U.S.C. 207(a) 2
29 U.S.C. 213(a)(1) 2
29 U.S.C. 213(a)(16) 18
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* 2
29 U.S.C. 251(a) 2
29 U.S.C. 254(a) (§ 4(a)) 2, 3, 10, 16
29 U.S.C. 254(a)(1) (§ 4(a)(1)) 7, 10, 13
29 U.S.C. 254(a)(2) (§ 4(a)(2)) 10
29 U.S.C. 254(b) 2, 18
29 U.S.C. 254(b)(2) 16
5 U.S.C. 5545a 18

Regulations and rules—Continued Page

5 C.F.R.:
Section 551.422(b) 3, 7
Section 533.221(f) 12
29 C.F.R.:
Section 785.35 ..... 3, 7
Section 785.38 ..... 3, 14
Section 785.41 16
Section 790.7(c) 3, 7, 16
Section 790.7(d) 16
Fed. R. App. P.:
Rule 3 19
Rule 3(c)(1) 19
Rule 3(c)(4) 19
Rule 4 19
Fed. R. Civ. P. 54(b) 4, 19
9th Cir. R. 36-3(a) 15

Miscellaneous:

H.R. Conf. Rep. No. 741, 103d Cong., 2d Sess. (1994) ... 18
OPM, *Hours of Work for Travel* (visited Nov. 29, 2007) <http://www.opm.gov/oca/worksch/html/travel.asp> 16
Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* (May 30, 1986) 16

In the Supreme Court of the United States

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STEPHEN S. ADAMS, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 471 F.3d 1321. The opinion of the Court of Federal Claims (Pet. App. 11a-58a) is reported at 65 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2006. A petition for rehearing was denied on March 14, 2007 (Pet. App. 59a-60a). On May 31, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 27, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires that an employer pay overtime compensation when it employs a non-exempt employee for a workweek longer than forty hours. 29 U.S.C. 207(a), 213(a)(1). The Act does not define "work" or "workweek," and this Court's early cases construed the term "work" broadly as activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005) (*IBP*) (citation omitted). The substantial and unexpected scope of employer liability under those early decisions led Congress to enact the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, to narrow the coverage of the FLSA. See *IBP*, 546 U.S. at 26-27, 41; 29 U.S.C. 251(a).

As is relevant here, Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. 254(a), relieves employers from FLSA overtime liability for the following employee activities, unless such activities are compensable under a contemporaneous contract or "custom or practice" in effect at the place of employment (29 U.S.C. 254(b)):

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or sub-

> sequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Regulations promulgated by the United States Department of Labor (DOL) and Office of Personnel Management (OPM) explain that "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel," which is a "normal incident of employment" and "not worktime." 29 C.F.R. 785.35; see 5 C.F.R. 551.422(b); 29 C.F.R. 790.7(c). Such home-to-work travel, however, does not encompass an employee's transit to a work site that occurs after the employee has traveled from his home to an employer-specified location and started to perform the day's work. Where an employee is "required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools," the "travel from the designated place to the work place" is compensable as work. 29 C.F.R. 785.38.

2. Petitioners are 6610 individuals (of approximately 14,000 plaintiffs in this case) who claim to have been employed as criminal investigators by five federal law enforcement agencies, and who brought suit in the Court of Federal Claims alleging that the government failed to pay them overtime compensation as required by the FLSA. Pet. 2, 6.[1] The parties subsequently settled all relevant claims in the plaintiffs' consolidated lawsuits affecting petitioners except the claim that time spent commuting between home and work in a government vehicle was work subject to overtime compensation.

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[1] For purposes of this brief, we accept petitioners' representations (Pet. 2, 6) that all 6610 petitioners are criminal investigators.

a. After the parties filed motions for partial summary judgment on this claim in 2002 and 2004, the Court of Federal Claims entered a Fed. R. Civ. P. 54(b) partial final judgment in favor of the government. Pet. App. 11a-58a. The court explained that the 2002 motion governed overtime claims of certain Secret Service and Customs Service employees who performed law enforcement-related work but were not criminal investigators (GS-9/11 plaintiffs) and who claimed to have been required to drive government vehicles between home and work in order "to have the vehicles readily available for emergency response to agency needs," *id.* at 38a. See *id.* at 12a-13a, 36a-38a. The court concluded that those plaintiffs failed to proffer evidence of such a requirement, much less "evidence of restrictions or burdens on [them] during their commutes, such as prohibitions on personal stops or a requirement to monitor radio communications." *Id.* at 37a-39a. It further noted that those plaintiffs did "not claim back pay for emergency response activity" that they might have performed and that the "record is devoid of any facts concerning the regularity, aggregate duration, or time-keeping burden related to any emergency response activities." *Id.* at 39a & n.7. "In the absence of any alleged facts as to compensable work activity occurring during the[ir] commutes," the court held that the GS-9/11 plaintiffs had "not shown that any work during the[ir] commutes was more than *de minimis*." *Id.* at 39a-40a.

The court similarly concluded that the overtime claims of the GS-12 criminal investigators at issue in the 2004 summary judgment motions were without merit. Pet. App. 13a, 40a-58a. It explained that their claims were based solely on time spent commuting with a government vehicle between home and work in order to be

able to respond to emergencies, did not include any time performing activities other than driving, and did not include time associated with any emergency response. *Id.* at 41a & n.9, 56a-57a. While the GS-12 plaintiffs proffered evidence that they were required to monitor their radios and were prohibited from making personal stops during their home-to-work commutes, they presented "no evidence" of the "frequency, duration, or record-keeping difficulties" associated with "compensable work [that might have] occurred during their commutes." *Id.* at 57a-58a. Without evidence of such commuting-related work beyond a "*de minimis* threshold," the court held that the GS-12 plaintiffs failed to establish "facts necessary to establish the elements of a successful commuting time claim" because, under circuit law, "plaintiffs' commutes, by and of themselves, are not compensable merely because they take place in a government vehicle and facilitate emergency response from the plaintiffs' homes." *Ibid.*

b. The court of appeals affirmed. Pet. App. 1a-10a. After holding that it possessed appellate jurisdiction over appeals by all 6610 petitioners, *id.* at 2a-4a, the court concluded that the "plaintiffs' evidence does not demonstrate any ground for relief" under the court's prior decision in *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998). Pet. App. 7a-9a.

In *Bobo*, the court had addressed a "basically identical claim" by Border Patrol K-9 officers who were required to commute to and from work in government cars and, during their commute, to monitor their radios, refrain from personal stops, and stop to walk their dogs as needed. Pet. App. 7a-8a. To determine whether the officers' home-to-work commute constituted compensable work as "an integral and indispensable part of the prin-

cipal activities" for which they were employed, *Bobo* adopted the Second Circuit's approach of examining a plaintiff's commuting activity in light of the degree to which the "activity is undertaken for the employer's benefit," the degree to which it is "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." 136 F.3d at 1467-1468 (quoting *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956), and *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 650 (2d Cir. 1995)). Where the employee's work activity during the commute "is truly minimal, it is the policy of the law to disregard it." *Ibid.* (quoting *Reich*, 45 F.3d at 650).

The *Bobo* court ultimately held that, while compulsory restrictions were placed on the dog handlers' commutes that benefitted the Border Patrol and were closely related to the employees' principal work activities, those restrictions were negligible as a whole because their impact was "infrequent, of trivial aggregate duration, and administratively impracticable to measure." 136 F.3d at 1468. In light of *Bobo*, the court of appeals here held that petitioners' commuting time was similarly non-compensable because, under petitioners' evidence, any "labor beyond the mere act of driving the vehicle is *de minimis*." Pet. App. 8a-9a.

The court of appeals also rejected the claim that the commutes of the GS-12 plaintiffs were compensable under a "custom or practice" of compensating such time. Pet. App. 8a-9a. Whereas other categories of employees had been eligible for such compensation, the court explained that no actual custom or practice provided such pay to employees like the GS-12 plaintiffs and that "hypothetical customs or practices" that might have applied

had the plaintiffs been classified differently "do not suffice." *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is not warranted.

1. a. The court of appeals correctly determined that petitioners are not entitled to overtime compensation for commuting between home and work with government vehicles because petitioners failed to present evidence that their commutes involved any meaningful degree of compensable work.

Section 4(a)(1) of the Portal-to-Portal Act of 1947 distinguishes between an employee's time spent on principal "work" activities (that is, the "principal activity or activities which [an] employee is employed to perform"), for which the FLSA requires overtime pay, and non-compensable time spent "traveling to and from the actual place of performance" of such "principal activity or activities" before the employee's principal work activities begin or after they cease. 29 U.S.C. 254(a)(1). This Court has held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29-30, 37 (2005) (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

The "integral and indispensable" test, however, is not satisfied whenever pre- or post-shift "activities are necessary for employees to engage in their principal activities." *IBP*, 546 U.S. at 40. All home-to-work commutes are "necessary" for an employee to perform the principal activity for which he is employed, yet it is undisputed that an employee's normal commute is not com-

pensable under the FLSA. Cf. 29 C.F.R. 785.35, 790.7(c); cf. also 5 C.F.R. 551.422(b). Even before Congress enacted the Portal-to-Portal Act to restrict the FLSA's application to travel time, this Court indicated that "traveling from workers' homes to [the workplace]" does not qualify as "work"—that is, activity both "controlled or required by the employer" and "pursued necessarily and primarily for the benefit of the employer and his business." See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-692 (1946) (citation omitted); cf. *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 651-652 (2d Cir. 1995) (applying this "concept of compensable work" to resolve dispute over home-to-work commuting). A home-to-work commute primarily benefits the employee because it accommodates the employee's choice of where to live; its duration is determined by that personal choice; and, when an employee elects to live farther from work (and accept a longer commute), that choice does not benefit the employer or his business.

In some circumstances, an employee may perform significant activities during a home-to-work commute that sufficiently alter its character to make it an "integral and indispensable" part of the employee's primary work activity that primarily benefits his employer. The court of appeals, like its sister circuits, has thus properly evaluated commuting-based overtime claims by weighing the degree to which activities associated with the employee's home-to-work travel are "undertaken for the employer's benefit," the degree to which they are "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." *Bobo* v. *United States*, 136 F.3d 1465, 1467-1468 (Fed. Cir. 1998) (quoting and following

Reich, 45 F.3d at 650). Moreover, where the work-related aspects of an employee's commute are negligible in light of the commute's normal benefit to the employee, the courts of appeals have held the time spent in such commutes to be non-compensable. See *Bobo*, 136 F.3d at 1468; *Reich*, 45 F.3d at 650, 652-653 (commuting by K-9 officers required to transport their dogs between home and work was not compensable where work-related duties during commute were "neither substantial, nor regularly occurring"); *Aiken* v. *City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (following *Bobo* and *Reich* and holding that commutes by K-9 officers required to transport their dogs between home and work in city vehicles are not compensable where no "more than a de minimis amount of time during their commutes" was spent on work activities), cert. denied, 528 U.S. 1157 (2000).

The court of appeals correctly applied this analysis to hold that petitioners' home-to-work commutes are not compensable. It accepted that petitioners were required to commute between home and work in government-owned vehicles to enable them to respond to emergency calls at any time; were prohibited from using those vehicles to run personal errands; were required to monitor their radios during their commutes, and were required to carry government-issued weapons and other law-enforcement equipment. Pet. App. 2a. The court nevertheless concluded that petitioners' evidence failed to demonstrate that their "normal commutes"—that is, commutes in which petitioners were not called to respond to an emergency or otherwise deviate from their standard route between home and work—involved any "labor beyond the mere act of driving the vehicle" that might cross even a minimal threshold. See *id.* at 2a n.1,

7a-9a.[2] Indeed, as noted (pp. 4-5, *supra*), petitioners failed to present any evidence concerning the frequency or duration of any work-related activity beyond the normal act of commuting. On that record, the court correctly concluded that petitioners' commutes were not compensable as an integral and indispensable part of an activity primarily benefitting the employer.

b. Petitioners contend (Pet. 11-12, 13-14, 18, 24) that the court of appeals applied a test for determining whether travel is a "principal activity" under Section 4(a)(1) of the Portal-to-Portal Act that is different than the test for determining whether other preliminary or postliminary activities are "principal activities" under Section 4(a)(2), and that this "two-tiered approach to Section 4(a)" erroneously makes driving that is an "integral and indispensable" part of a principal work activity non-compensable unless an employee also performs other work while driving. Petitioners are incorrect.

First, nothing in the court of appeals' decision suggests that it interprets "principal activities" in Section 4(a)(1) differently than the same term in Section 4(a)(2). The court applied its prior decision in *Bobo* to the facts of this case, see Pet. App. 8a, and *Bobo* expressly invoked this Court's ruling in *Steiner* that an activity is compensable under Section 4(a) when it is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Bobo*, 136 F.3d at 1467 (quoting *Steiner*, 350 U.S. at 256).[3]

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[2] Petitioners' settlements with the government have already compensated petitioners for time associated with petitioners' response to emergency or other calls that petitioners might have received while off-duty. See Pet. App. 41a & n.9.

[3] Petitioners contend (Pet. 23-24) that the court erroneously relied upon a 1996 amendment to 29 U.S.C. 254(a) concerning "activities

Second, petitioners misread the court's opinion as concluding that their commuting was an "integral and indispensable" part of their principal work activities. See Pet. App. 8a. The court concluded just the opposite after applying the Second Circuit's analysis in *Reich* to determine whether their commuting was an integral and indispensable part of their principal work activities. See *ibid.*; *Reich*, 45 F.3d at 649-651. *Reich* recognized that an activity can qualify as compensable work (or a part thereof) under the FLSA only if it is both "controlled or required by the employer" and is "*primarily for the benefit of the employer and his business.*" *Id.* at 650-651 (emphasis added) (quoting *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Commuting will not be done "primarily" for the employer's benefit and is not an integral and indispensable part of an employee's principal work activity where, as here, the work-related aspects of the commute are negligible in light of its benefit to the employee.

Petitioners argue (Pet. 18-19) that their commutes are an "integral and indispensable" part of their primary work activity because they must drive a government vehicle that could not be used for personal errands, monitor the radio, and carry a weapon in order to

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performed by an employee which are incidental to the use of [an employer's] vehicle for commuting." See Pet. App. 5a. The government advised the court of appeals in its response to petitioners' rehearing petition that the 1996 amendment does not apply to the particular context of this case. The amendment, however, appears only in the court's general discussion of the Portal-to-Portal Act, and it played no role in the court's holding, which was based exclusively on the analysis in *Bobo* and *Reich*, neither of which relies on the amendment. See *id.* at 7a-8a.

enable them to respond to emergency calls for work.[4] Petitioners' overtime claim, however, is only for normal commuting where no such response is at issue. Given that home-to-work commutes inherently benefit the employee, such routine drives to and from the employee's home do not primarily benefit an employer and are not compensable as work where, as here, any work-related activity beyond the normal act of commuting is sufficiently minimal. Cf. 29 C.F.R. 553.221(f) (use of patrol car to drive home and use on personal business is not work "even where the radio must be left on so that the officer can respond to emergency calls").[5]

While petitioners contend (Pet. 24-26) that the court of appeals applied a *de minimis* threshold in this case contrary to this Court's decision in *Anderson*, that contention does not bear scrutiny or merit this Court's review. *Anderson* concluded that "negligible" amounts of time performing work activities "may be disregarded" as *de minimis* under the FLSA. 328 U.S. at 692-693. This in no way precludes the use of an analogous type of rationale for determining whether certain activities have

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[4] Petitioners are required to carry or have readily accessible their government-issued weapon at all times. That obligation does not require the government to compensate petitioners for such time as "work."

[5] While petitioners assert (Pet. 20) that "even a significant, direct benefit to the employee" will not make an activity non-compensable under *IBP* and *Steiner*, neither case addressed the process of distinguishing between activities that primarily benefit the employer and those that do not. See *IBP*, 546 U.S. at 25, 32 (noting rule that activity must be "primarily for the benefit of the employer" to be work in case where litigants did not challenge ruling that donning and doffing unique protective gear was an "integral and indispensable" part of employees' principal work activity); *Steiner*, 350 U.S. at 252, 256 (no challenge to similar ruling).

negligible benefits for the employer in comparison to the benefit to, and the restrictions on, the employee. Cf. *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); 29 C.F.R. 785.17 (on-call employee who uses time for own purposes is not working). Moreover, petitioners err in asserting (Pet. 26) that the court of appeals' analysis under *Bobo* undercounts the time spent on multiple work-related activities by failing to evaluate that time in the aggregate. *Bobo* demonstrates that the court considers both the frequency and "aggregate duration" of the work-related activities alleged, see 136 F.3d at 1468, and, in any event, petitioners proffered "no evidence" of either the "frequency" or "duration" of any such activity to support their claims. Pet. App. 57a-58a; cf. *id.* at 39a (no evidence of "regularity" or "aggregate duration" of any work activity during commutes).

c. Petitioners argue (Pet. 13-17) that review is warranted to resolve a circuit conflict over whether the "legal standard[]" to apply to "driving" claims under Section 4(a)(1) is whether that driving is an "integral and indispensable" part of an employee's principal work activities. No such conflict exists.

As noted (pp. 10-11, *supra*), the court of appeals applied this standard from *Steiner* in evaluating whether an activity is part of a principal work activity and did so in the specific context of work-to-home commuting, which does not normally primarily benefit the employer. In contrast, petitioners rely on decisions in which the litigants did not address whether (and could not reasonably have disputed that) the activity in question would primarily benefit the employer. Petitioners' cases instead focused on other aspects of the question whether preliminary or postliminary travel activity is an integral

and indispensable part of an employee's primary work activity. A number of those decisions concluded that an employee performs such an integral and indispensable activity when driving his employer's vehicle between the employer's staging area and a work site in order to transport heavy equipment, tools, or supplies essential for performing his and others' job duties at the site. Cf. 29 C.F.R. 785.38.[6] One reflects that travel at the end of the day necessary to maintain the tools used to do the employee's principal work can be compensable.[7] The

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[6] See, *e.g.*, *Secretary of Labor* v. *E.R. Field, Inc.*, 495 F.2d 749, 750-751 (1st Cir. 1974) (electrician hired to work at construction site works when driving employer's truck to transport necessary tools and equipment from employer's shop to jobsite); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721, 723-725 (5th Cir. 1961) (truck drivers hired to deliver construction materials work when driving trucks from employer's truck yard to loading facility and when returning to yard after dropping load at destination); *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 (10th Cir. 1958) (employees hired to perform services at oil well work when driving trucks that transport necessary heavy equipment back from well site to employer's base); cf. *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) (discussing unpublished and non-precedential decision holding that employees work when driving vehicles that transport necessary tools from employer's lot to work site), petition for cert. pending, No. 07-554 (filed Oct. 25, 2007). The same result holds true when an employee must transit from one employer-specified location to another in the middle of the workday. See *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1118-1119 (10th Cir. 1999).

[7] See *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998). *Baker* held that welders hired to perform welding services at a worksite must be compensated for the "travel time associated with refueling and restocking the welding rigs" if such travel is proven to be an integral and indispensable part of their principal work activity, *id.* at 1215-1217, and that a jury must decide whether it was necessary "to transport the rigs from the work site each day to refuel and restock" or whether such maintenance could be performed on site. *Id.* at 1219. Because *Baker*

issues implicated by an overtime claim based on circumstances materially similar to home-to-work commuting were thus never addressed or decided in those decisions, which themselves recognize that overtime claims are highly contextual and "must be decided upon [their] peculiar facts." See, *e.g.*, *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 & n.4 (10th Cir. 1958); accord *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214, 1218-1219 (10th Cir. 1998).[8]

d. Relevant regulatory guidance by OPM and DOL is likewise consistent with the decision of the court of appeals. Cf. Pet. 20-23. Petitioners rely heavily on Federal Personnel Manual Letter No. 551-10, which, without analysis, lists "certain situations where an employee may perform an activity * * * while traveling from home to work that could result in such travel time being considered hours worked." Pet. App. 66a, 68a. While the letter could be interpreted as supporting petitioners' position, OPM withdrew the letter when it abolished its

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concerned only "whether the travel associated with refueling and restocking the rigs" is compensable work, *ibid.*, it did not address whether a welder must be compensated for his commute home if he drives there after refueling and restocking.

[8] The Ninth Circuit, in a unpublished decision, has ruled that work foremen who were employed to drive their specially equipped company trucks to an out-of-town jobsite in order to transport equipment, tools, and crew members to the site each day must be compensated for driving the trucks back to town (often to their homes) because their employer required that they drive the trucks away from the worksite and prohibited them from returning the trucks to the company office in town. See *Dole* v. *Flint Eng'g & Constr. Co.*, 914 F.2d 262 (9th Cir. 1990) (Table). That decision is consistent with the outcome in this case, and, in any event, would not give rise to a circuit conflict warranting this Court's review because it has no precedential effect for future cases. See 9th Cir. R. 36-3(a).

Manual in 1993 (effective 1994). See *Nebblett* v. *OPM*, 237 F.3d 1353, 1358 (Fed. Cir. 2001). OPM's superseding guidance reflects the agency's view that home-to-work commuting can be compensable if an employee is required by his employer to do "productive work of a *significant* nature" during the commute beyond driving a government vehicle. See OPM, *Hours of Work for Travel* (visited Nov. 29, 2007) <http://www.opm.gov/oca/worksch/html/travel.asp> (emphasis added) (citing *Bobo*). DOL regulations addressing employment contexts inapplicable here likewise do not advance petitioners' cause because none addresses circumstances materially similar to home-to-work commuting where any work-related activity is *de minimis*.[9] In any event, even if regulatory guidance were both applicable and contrary to the decision of the court of appeals, such tension would not warrant this Court's review.

2. Petitioners argue (Pet. 28-30) that, even if their home-to-work commutes are not compensable as a principal work activity, they are nevertheless entitled to payment under a "custom or practice" at their employing agencies "in effect[] at the time of such activity," 29 U.S.C. 254(b)(2). The court of appeals properly rejected that argument, which does not warrant review.

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[9] See, *e.g.*, 29 C.F.R. 790.7(c) (mandatory after-hours travel "on the business of [the] employer" does not "ordinarily" fall within Section 4(a)), 790.7(d) (traveling "while performing active duties" specified by employer such as carrying "heavy equipment" not covered by Section 4(a)), 785.41 ("work" required to be performed while traveling is compensable; employee whose work is to "drive[]" a vehicle is working while traveling except during meal periods and when authorized to sleep); Wage & Hour Div., DOL, *Field Operations Handbook* § 31d00 (May 30, 1986) (addressing "special problems" applicable to employees employed to drive ambulances); *id.* § 31d00(a)(5).

Petitioners contend that OPM's (withdrawn) Federal Personnel Manual Letter No. 551-10 demonstrates the existence of a "custom or practice" of paying overtime to certain non-exempt employees for commuting similar to that claimed here, and argue that they must be compensated under that custom or practice because a 2003 settlement agreement between the GS-12 plaintiffs and the government states that, for purposes of litigating plaintiffs' remaining driving-time claims, the GS-12 plaintiffs "were FLSA non-exempt." C.A. App. A105. The court of appeals correctly concluded that any non-exempt employees who obtained such compensation were not similarly situated to petitioners, and that the government's stipulation that petitioners' claims for past work would not be exempt from the FLSA did not permit petitioners to recover based on "hypothetical customs or practices" that never applied to their job classification. Pet. App. 9a. Indeed, while some agencies may have adopted the OPM's (long-since-withdrawn) interpretive guidance to provide overtime compensation to certain employees, there was never any custom or practice of providing compensation for home-to-work commuting to anyone in petitioners' positions and grades.

Moreover, petitioners' practice-or-custom claim fails for at least two additional reasons. First, no custom or practice of providing pay beyond that required by statute can properly be imputed to the federal government. The terms of petitioners' appointment to federal service "were governed exclusively by statute," and employing agencies lack authority to establish customs or practices for petitioners' compensation beyond that authorized by Congress. See *Adams* v. *United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004), cert. denied, 546 U.S. 811 (2005); cf. Pet. App. 19a-23a, 36a. Second, the Portal-to-Portal

Act's custom-or-practice provision is an exception to the Act's provision relieving employers of overtime liability; it does not impose such liability under the FLSA as an original matter. See 29 U.S.C. 254(b). For the reasons previously discussed (pp. 8-10, *supra*), petitioners' time spent commuting would not qualify under the FLSA as compensable "work" primarily benefitting their employers.

The unusual nature of petitioners' claim of a custom or practice inferred via settlement agreement further counsels against certiorari. Petitioners claim no circuit split on this question, which is unlikely to recur with any frequency.

3. a. Finally, review is unwarranted because of the limited prospective importance of this case. Petitioners themselves explain (Pet. 6 & n.3) that they are criminal investigators whose compensation is no longer governed by the FLSA.[10] For the past 13 years, federal criminal investigators have been provided availability pay under 5 U.S.C. 5545a in lieu of compensation under the FLSA's overtime provisions. See 29 U.S.C. 213(a)(16); cf. H.R. Conf. Rep. No. 741, 103d Cong., 2d Sess. 57 (1994) (Congress enacted new pay regime, among other things, to "prevent litigation" on overtime claims). Thus, while the question of FLSA overtime pay for home-to-work commuting may have prospective importance for employees outside federal criminal law enforcement, the context-specific nature of such FLSA claims counsels against review here.

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[10] As noted (at note 1, *supra*), we accept petitioners' representation that they are criminal investigators for purposes of this brief. We are unable to independently determine from the record on appeal whether any petitioner has asserted claims based on employment other than as a criminal investigator.

b. Additionally, while the government has not cross-petitioned from the judgment of the court of appeals, the court erred to the extent it exercised appellate jurisdiction over the claims of more than two of the 6610 petitioners. Cf. Pet. App. 2a-4a. Jurisdictional defects in petitioners' notices of appeal deprive this Court of jurisdiction to review petitioners' case in its entirety and significantly restrict the relief that this Court could grant on review.

The "time limits for filing a notice of appeal are jurisdictional," *Bowles* v. *Russell*, 127 S. Ct. 2360, 2362, 2366 (2007), and Appellate Rules 3 and 4 are "linked jurisdictional provisions" that govern the filing of a notice of appeal. *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001). As is relevant here, Rule 3(c)(1) requires that the "notice, *within Rule 4's timeframe*, must * * * specify the party or parties taking the appeal." *Id.* at 765 (emphasis added). While a timely notice will sufficiently do so if the appellants' identities are "objectively clear" from the notice, *id.* at 766-767; Fed. R. App. P. 3(c)(4), petitioners' notices fall short of this standard.

The two notices of appeal here identified the appellants as, respectively, "plaintiff Steven S. Adams and 6,479 additional plaintiffs" and "plaintiff James J. Aaron and 129 additional plaintiffs." See Joint Notices of Appeal (filed Dec. 19, 2005). Because there are more than 14,000 plaintiffs in these consolidated cases and the plaintiffs' previous court filings never identified which individual plaintiffs were affected by the Rule 54(b) judgment below, we know of no way to have reasonably identified from the record which plaintiffs were encompassed by the notices' (potentially overlapping) groups of "6,479 additional plaintiffs" and "129 additional plaintiffs."

The court of appeals did not conclude otherwise. It held that the appellants' identities later *became* "objectively clear" when petitioners' counsel filed an appearance in the court of appeals with an appendix listing all 6610 petitioners. Pet. App. 3a-4a & n.3. That appearance, however, was filed *after* the relevant 60-day appeal period had expired. Petitioners did not, "within Rule 4's timeframe," sufficiently identify any "parties taking the appeal" other than Steven Adams and James Aaron. This Court's jurisdiction thus properly extends only to those two petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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76

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IN THE

Supreme Court of the United States

STEPHEN S. ADAMS, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

A. The Conflict Is Real, Substantial, and Persistent 1

B. The Federal Circuit's Construction Conflicts With That of the Government, As Law Enforcer 4

C. The Federal Circuit's Construction, Even As Reformulated, Cannot Be Reconciled With This Court's 5

D. The Issue, Important and Squarely Presented Here, Warrants This Court's Review 9

E. The Court Should Grant Review on the Custom or Practice Issue, As Well 10

Conclusion 10

TABLE OF AUTHORITIES

CASES

Aiken v. *City of Memphis*,
190 F.3d 753 (6th Cir. 1999) 3

Anderson v. *Mount Clemens Pottery Co.*,
328 U.S. 680 (1946) 8

Baker v. *Barnard Const. Co., Inc.*,
146 F.3d 1214 (10th Cir. 1998) 2

Bobo v. *United States*,
136 F.3d 1465 (Fed. Cir. 1998) 1, 5, 7, 9

Dole v. *Flint Engineering and Const. Co.*,
914 F.2d 262 (9th Cir. 1990) (table) 2

Dunlop v. *City Electric, Inc.*,
527 F.2d 394 (5th Cir. 1976) 2, 4, 8

Graham v. *City of Chicago*,
828 F. Supp. 576 (N.D. Ill.1993) 3

IBP, Inc. v. *Alvarez*,
126 S. Ct. 514 (2005) 1, 5, 6, 7

Karr v. *City of Beaumont*,
950 F. Supp. 1317 (E.D. Tex. 1997) 3

Long Island Care at Home, Ltd. v. *Coke*,
127 S. Ct. 2339 (2007) 4

Reich v. *New York City Trans. Auth.*,
45 F. 3d 646 (2d Cir. 1995) 4, 7, 9

Schmidt v. *Dept. of the Interior,*
153 F.3d 1348 (Fed. Cir. 1998), ... 5

Steiner v. *Mitchell,*
350 U.S. 247 (1956) 5, 6, 7

Torres v. *Oakland Scavenger Co.,*
487 U.S. 312 (1988) 9

United Transp. Union Local 1745 v. *Albuquerque,*
178 F.3d 1109 (10th Cir.1999) 3, 9

STATUTES AND COURT RULES

29 U.S.C. § 254(a). ..... *passim*

29 U.S.C. § 254(b). 10

31 U.S.C. § 1344(a)(2)(B) 7

Fed. R. App. P. 3(c) 9, 10

REGULATIONS & ADMINISTRATIVE MATERIALS

26 C.F.R. § 1.274-5T(k)(3) 8

29 C.F.R. § 553.221(a) 3

29 C.F.R. § 785.41 ..... 3, 8

U.S. Civil Service Commission,
Federal Personnel System Manual (FPM)
Letter No. 551-10 (April 30, 1976) 5, 8, 10

U.S. Department of Labor, Wage and
Hour Div., Field Operations Handbook 4

U.S. Department of Labor, Wage and
Hour Div., Wage-Hour Op. Letter
No. 454 (Feb. 9, 1978) 4

Br. Amicus Curiae of the U.S., *IBP, Inc.* v. *Alvarez*,
No. 03-1238 (2005) 6

Plaintiff's Memorandum in Opposition
to Summary Judgment, *Chao* v. *Tyson Foods*,
2:02-cv-0174-VEH (N.D. Ala.) (filed Aug. 27, 2007) .. 4

OTHER MATERIALS

Transcript of Oral Argument, *Adams, et al.* v.
United States, Nos 06-5040 & 06-5041
(Fed. Cir. Nov. 8, 2006) 8

OPM, *Hours of Work for Travel*
http://www.opm.gov/oca/worksch/html/travel.asp
(visited Dec. 8, 2007) 5

The Federal Circuit, in this case and *Bobo*, has interpreted the FLSA to mean that employer-required driving "done for the employer's benefit, under the employer's rules, is noncompensable," App. 9a., unless the employee "perform[s] additional legally cognizable work while driving," *id.* 5a.

The Petition showed (1) that this construction, while consistent with the Sixth Circuit's, conflicts squarely with decisions of other federal and State courts, with the Labor Department's and OPM's FLSA and Portal Act regulations, and with this Court's decision in *Alvarez*; and (2) that review is especially warranted on account of the issue's broad practical importance and because the Federal Circuit's restrictive rule contravenes Congress's intent that the FLSA rights of federal employees be consistent with those of other workers.

Nothing in the Opposition detracts from any of this. The Government's brief and perfunctory denial of a circuit split – consisting largely of unelaborated assertions that conflicting decisions are in fact "consistent" and reminders that factual peculiarities can explain case outcomes – falls drastically short here, where courts' stated legal standards are *facially* in conflict; cases presenting *identical* facts yield opposite results; and a factually *stronger* FLSA claim fares worse under the Federal Circuit rule than would a weaker one elsewhere.

Nor does the Opposition's effort to cast the Federal Circuit decision as consistent with *Alvarez* diminish the need for review. The "Federal Circuit rule" the Opposition defends bears only a modest resemblance to the one that court actually applies – and the refurbished version is still contrary to *Alvarez* and to the longstanding interpretations of the Secretary of Labor and OPM. And as demonstrated below, the Opposition's reasons supposedly "further" militating against certiorari fail to withstand scrutiny.

A. The Conflict Is Real, Substantial, and Persistent

The Petition (at 13-20) identified decisions of no fewer than 11 different courts, each holding that driving to or from work is compensable when that activity is "integral and

indispensable," without any inquiry whether "additional legally cognizable work [was performed] while driving." Pet. App.9a.

The Opposition largely takes a "nothing to see here, move along" approach to this potent evidence of decisional conflict – confining its mention of the inconvenient cases to footnotes, omitting a number altogether, and asserting, without further explanation, that another, "is consistent with the outcome in this case," Opp. 15 n.9 (citing *Dole* v. *Flint Eng'g*). Noting that this case arises in the "specific context" of Petitioners' federal law enforcement employment, Opp. 18, it asks the Court to assume that divergent results reflect courts' "decid[ing cases] upon [their] peculiar facts." *id.* 15 (citation omitted).

1. These assurances notwithstanding, the difference between the competing legal standards could hardly be more obvious and sharp. While the Federal Circuit treats required driving "done for the employer's benefit, under the employer's rules" as noncompensable (absent further duties), the Fifth Circuit has held that Section 4(a) *only* exempts activities undertaken "for [employees'] own convenience, [and neither] * * * required by the employer [nor] * * * necessary for the performance of their duties," *Dunlop*, 527 F.2d, 394, 398 (5th Cir. 1976). And the Tenth Circuit, in *Baker*, held that whether time spent driving a vehicle home is a "principal activity" or noncompensable "[n]ormal travel" depends whether:

> the [employees] were truly free to go where they wanted at the end of the work day and to use whatever method of transportation they chose * * * *; whether [they] could have left the [vehicles] at the work site * * *, or whether [they] were required, by policy or practical reality, to transport the[m] from the work site each day * * * *

146 F.3d at 1219. That decision did not view what the Federal Circuit makes dispositive – "additional work" during the drive – as even *relevant* to the FLSA analysis, and in this case, the answers to the Tenth Circuit's central questions are beyond dispute: petitioners were *required* to transport the specially-equipped, employer-owned vehicles "from work each day."

2. This is just the beginning of the problems for the Government's "peculiar facts" claim. That hypothesis cannot possibly explain why courts applying Fifth and Seventh Circuit law reach results directly opposite to those of the Sixth and Federal Circuits *in cases raising essentially identical facts* – police canine handlers required to transport dogs between home and work each day. Compare *Graham* v. *Chicago*, 828 F. Supp. 576 (N.D. Ill.1993); *Karr* v. *Beaumont*, 950 F. Supp. 1317 (E.D. Tex. 1997) with *Aiken*, 190 F.3d 753 (6th Cir. 1999).

3. Worse still, circumstances the *Government* suggests are legally relevant make Petitioners' claim of "principal activity," rejected at the threshold under the Federal Circuit rule, far *stronger* than ones that succeeded in other courts. This case involves driving – rather than merely "riding" to work – see 29 C.F.R. § 785.41, compare *UTU*; the driving is required not merely as a matter of "practical reality," *Baker*, 146 F.3d at 1219, but as a binding condition of Petitioners' employment. In Petitioners' case (unlike *Flint*), transporting the vehicles home is specifically required so they could perform further job duties – emergency response in the law enforcement vehicle – there. And Petitioners, unlike the prevailing employees in *Flint* or *UTU*, have job responsibilities during the drive and are barred from making personal stops or carrying passengers.

4. Nor can the conflict be explained by the fact that this case, but not others, arises in the "context" (Opp. 15) of law enforcement. *Graham* and *Karr* also arose in that context, and nothing in Section 4(a)'s text supports any such distinction. Indeed, the controlling regulations expressly confirm the opposite: while special rules apply to meals and sleep time for certain police officers, "[t]he general rules on compensable hours of work * * * set forth in 29 CFR Part 785 [are] * * * applicable to [those] employees." 29 C.F.R. § 553.221(a).[1]

[1]The Government's effort (Opp. 4-7) to depict the decision as resting on some supposed evidentiary failing is baseless: the Court of Appeals, correctly, treated as "undisputed," App. 2a, that Petitioners were required to drive between home and work in Government-owned vehicles, to enable them to respond to emergency calls at any time; prohibited from using those

B. The Federal Circuit's Construction Conflicts With That of the Government, As Law Enforcer

As the Petition explained, the interpretation of Section 4 adopted by the Federal Circuit and now embraced in the Opposition is in sharp opposition to the Government's construction as interpreter and enforcer of the FLSA in the private and nonfederal sectors. The Opposition (p. 16) obliquely acknowledges "tension," but insists that it is neither specific nor important enough to warrant this Court's review.

1. What the Government calls "tension" is fairly described as fundamental disagreement: in a legal memorandum submitted after the filing of the Petition here, the Secretary of Labor espoused the view that Section 4(a) "'exclude[s] from FLSA coverage *only* those activities * * * [in which][*n*]*o* benefit * * * inure[s] to the [employer],'" Mem. in Opp. to Summ. Judg., *Chao* v. *Tyson Foods*, 2:02-cv-0174-VEH (N.D. Ala.) (Aug. 27, 2007) at 30 (quoting *Dunlop*; emphasis added by Government), and that, rather than being "highly contextual" (Opp. 15), the "integral and indispensable test is a general rule * * * that can apply in any environment," *id.* at 22.

2. Nor has the Department only spoken in "materially [dis]similar" circumstances (Opp. 16). It has long construed the FLSA and Portal Act to mean that "if the employer requires or directs an employee to drive an employer's vehicle to a job location, such travel time would constitute hours worked," see Ltr. No. 454 (Feb. 9, 1978), and what is "material" under F.O.H. § 31d00(a)(5), defining when "time spent in driving would be hours worked," is not that the vehicle is an ambulance (Opp. 16 n.9), but rather that the "employee is required to [drive it] home in order to respond to calls immediately." *Reich* was an enforcement action based on the Department's construction of its FLSA and Portal Act regulations, see *L.I. Care at Home* v. *Coke*, 127 S. Ct. 2339 (2007), as was almost

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vehicles to run personal errands; required to monitor their radios during their commutes, and required to transport government-issued weapons and other law-enforcement equipment.

every case holding driving a compensable principal activity.

3. As the Petition (p. 21) explained, this conflict *is* important – not because it is unseemly for the Government to advance different constructions as law enforcer and employer, but because Congress expressly intended that federal employees enjoy the same FLSA protections as their counterparts in private and local government employment.

4. For this same reason, the Government's effort (Opp. 16) to disparage Letter 551-10 and elevate the "guidance" appearing on an OPM webpage is beside the point: even if the website represented the considered judgment of that agency, the law is clear that the Labor Department's (conflicting) construction of the FLSA would control. That said, Letter 551-10, which specifically addresses the circumstances of this case, is not, as the Government implies, some informal expression of opinion plucked from an agency file drawer: it announced the government-wide rule, adopted almost contemporaneously with the FLSA's extension and in place for decades, including all times relevant to this case. See *Schmidt* v. *DOI*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998) (relying on FPM in post-"sunset" case). By contrast, the guidance, which appeared years after the activities here at issue, does not purport to speak to these circumstances, let alone do so retroactively; it is, in fact, little more than recognition of *Bobo* as the law of the Federal Circuit.

C. The Federal Circuit's Construction, Even As Reformulated, Cannot Be Reconciled With This Court's

Given *Alvarez*'s teaching that "[t]here is no plausible argument that ["principal activities"] * * * mean[s] something different" in Sections 4(a)(1) and (2), 546 U.S. at 34, the Government labors strenuously to acquit the Federal Circuit of having adopted a "two tiered" construction, explaining that the *Bobo* opinion, no less than those of the Fifth and Tenth Circuits, "[e]xpressly invoked this Court's ruling in *Steiner*," Opp. 10, and asserting that "nothing in the court of appeals' decision [here] suggests" the court applies a special rule for driving, as against other activities. *Id*

The latter assertion pushes the limits of acceptable hyperbole; the opinion began by identifying a Portal Act rule "specific[] to vehicular travel," App. 5a, described as framing the legally controlling "question in this appeal." And if "invoking" the appropriate decision of this Court established an opinion's correctness, the certiorari docket would quickly run dry: the relevant question is whether the decision's *understanding* of *Steiner* is correct.

1. The centerpiece of the Government's claim of "consistency" is that, rather than embodying a dual standard, the Federal Circuit rule adapts the unitary Section 4(a) rule to the "specific context of work-to-home commuting, which does not normally primarily benefit the employer." Opp. 13. But so restated, the rule is still irreconcilable with *Steiner* and *Alvarez*. Both cases concerned an activity – changing clothes – that "normally does not primarily benefit the employer." The whole thrust of the Court's decisions was that such activities are "principal" – and therefore beyond the reach of Section 4(a) – when, in fact, they are integral and indispensable. See U.S. Amicus Br., No. 03-1328, at 29 ("Congress expressly contemplated that donning gear could be a compensable principal activity for some employees and not others"). *Alvarez* held that "any activity that is 'integral and indispensable' * * * is itself a 'principal activity' 546 U.S. at 37. That the activity in question is one that is not always compensable (or "normally" might not be) is a reason for performing the *Steiner* analysis – not for altering it.

2. The Government's attempt to tether the Federal Circuit rule to the recognition that not every "necessary" activity is a "principal" one, Opp. 7 (quoting 546 U.S. at 40), misunderstands both *Alvarez* and the claim here. The limitation recognized there explains why *ordinary* home-to-work driving is not compensable work – *pace* Woody Allen, "showing up" may be a precondition for performing work, but in the "normal commute" situation, the employer is indifferent as to how an employee arrives – or where he goes (or how he travels) at the

end of the working day. Here, because driving the employer's vehicles is "essential for the safe and efficient performance of [Petitioners'] * * * law enforcement duties," 31 U.S.C. § 1344(a)(2)(B), it is a mandatory condition of employment.

This obvious difference was not beyond the Court's contemplation in *Alvarez*. The very passage the Government cites – in which the Court held that merely waiting to perform a principal activity does not satisfy the "integral and indispensable" standard – went on to explain that the "analysis would be different if [the employer] *required* its employees to arrive at a particular time in order to begin waiting." 546 U.S. at 40 n.8 (emphasis added). That, in a nutshell, is this case.

3. Nor is there merit to the claim (Opp. 11-12) that the Federal Circuit rule may be read *as if* it had applied the "integral and indispensable" test to Petitioners' driving – and concluded, as a matter of law, that the "primary benefit" to the employee outweighed other, countervailing "factors," *e.g.*, that Petitioners had no "choice * * * in the matter."

One scours the decision below (and *Bobo*) in vain for any indication the court performed the analysis or made the determinations the Government ascribes to it.[2] But this *post hoc* rationale is riddled with problems in any event. First, "predominant benefit" is a strange basis to distinguish the activity here from that in *Steiner* and *Alvarez*: where donning gear protected the "health and hygiene," 350 U.S. at 249, of the employees, the activity here has been deemed by Congress "essential" to the employer's purposes. Indeed, *Steiner* plainly attached weight to the fact that the activity was required, and a number of courts (and the Secretary of Labor) take the position

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[2]In fact, *Reich*, while *identifying* these factors as relevant, did not actually undertake a balancing, either – and, contrary to the Federal Circuit's assumption, that case and *Bobo* were critically *dis*similar. The canine handlers in *Reich* were *not* required to drive employer vehicles, See 45 F.3d at 648 n.2. (nor, apparently, were they barred from stopping or carrying passengers). Thus, any balancing in that case would have entailed weighing the employer benefit *against* the fact the employees had "choice * * * in the matter" – whereas here, and in *Bobo*, all factors point toward compensation.

that, in such circumstances, *any* benefit to the employer will place the activity outside the 4(a) exception, see *Dunlop*.

Under any circumstances, the claim that the driving here "primarily benefits the employee because it accommodates the employee's choice of where to live," Opp. 8, would hardly be self-evident. In addition to the Government's practice of paying compensation under Letter 551-10, the IRS has long recognized driving of a law enforcement vehicle under these circumstances as an exception to its general rule that driving a work vehicle home is a taxable benefit, see 26 C.F.R. § 1.274-5T(k)(3)-(7); and it by no means natural to describe the activity at issue as an "*accommodation*" of employees – it involves a mandate, one that requires performance of labor, *i.e.*, driving, see 29 C.F.R. § 785.41, of an employee who would rather ride public transportation or in a spouse's car and interferes with the benefits of normal commuting, such as running errands or dropping children off at school. Indeed, there is no need to rest on inferences here; at oral argument in the Federal Circuit, the United States, pressed on the benefit question, answered:

> It may benefit the employee in a lot of ways, but we don't dispute that the reason it's required is because the government gets enough of a benefit from it that the government chooses to require it.

Tr. Oral Arg. (Nov. 8, 2006) at 35.[3]

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[3]The Opposition also ventures a defense of the Federal Circuit's reliance on the "de minimis" rule, insisting that while this Court's *Anderson* decision concerned negligible amounts *of time*, it in "no way preclude[d]," Opp. 12, lower courts from formulating different rules by analogy. To be sure, the Court does not control the analogies to which its decisions might give rise, but the Federal Circuit did not purport to be reasoning by analogy; it claimed to be applying precedent in the *Anderson* line. But treated as an analogy, it is an entirely inapt one: the subject of the *Anderson* rule, amounts of time an activity requires, are objective and quantifiable, and the test applies in an area where the law is silent. And *Anderson* rested on the rule that the law (and workplace reality) are not concerned with "trifles." It cannot plausibly be claimed that an employee, previously free to structure his pre- and post-shift time as he pleased, would meet an order to drive a work vehicle back and forth each day, without making stops or carrying

D. The Issue, Important and Squarely Presented Here, Warrants This Court's Review

1. There is no merit to the odd claim that, notwithstanding the importance of the question presented "for employees outside federal criminal law enforcement," Opp. 18, review may be denied here, on account of its "limited prospective importance" to Petitioners, whose positions are no longer covered by FLSA's overtime provision. The "federal law enforcement" context played no role in the *Bobo* decision, which explicitly sought to align Circuit law with its (mistaken) understanding of *Reich*, see n.2, *supra*, and this Court's longstanding explanation of its certiorari jurisdiction does not support denying review of a case raising a conflict over a significant question of federal statutory law because the petitioning litigants might not have *future* claims. Such a rule would be especially perverse here, where the case is of undeniable *present* importance to thousands of individual Petitioners, who have pursued this litigation for nearly two decades – and where the issue has immediate, *prospective* significance for thousands of other individuals with claims currently pending at the trial court level, see Pet. 8 n.4.

2. Nor does F.R.A.P. 3(c) (Opp. 19) in any way counsel against review. Before the Court of Appeals, the Government did not press a claim, as it now does, based on professed inability to figure out which subset of the 14,000 plaintiffs were appealing. It argued, citing *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), that the notices of appeal did not satisfy Rule 3(c), because they did not bear the names of every appealing plaintiff – an argument the Federal Circuit rejected, App. 3a, noting, as the Government had neglected to, that *Torres* had been superseded by a 1993 amendment, expressly approving of designations such as "the plaintiffs A, B, et al.," and "all defendants except X."

Rather than quit while behind, the Government advances a

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passengers, with the same equanimity as a request to undertake, on an occasional basis, some activity requiring a minute or two of his time.

different, but equally baseless Rule 3(c) claim – that the (amended) Rule's practical notice requirement supplies "prudential" grounds for denying review. As the Government necessarily concedes, the doubts it tries to sow would not, if they had substance, go to this Court's (or the appellate court's) power to decide the issue – and they would not, for reasons just explained, alter the importance of the case for the many employees and employers whose lawsuits and work arrangements the question affects. But the Government's claim – that notices of appeal on behalf of "Steven S. Adams and 6,479 additional plaintiffs" and "James J. Aaron and 129 additional plaintiffs," left the courts below guessing as to who among the plaintiffs was appealing – is fatuous. It was manifestly clear that those numbers referred to the individuals who were parties to the settlements, see Opp. 4, which describe in detail which plaintiffs benefitted (and were bound) thereby.

E. The Court Should Grant Review on the Custom or Practice Issue, As Well

As to Section 4(b), the construction below was, despite the Government's *ipse dixit* claim of correctness (Opp. 17), utterly contrary to the plain meaning and purpose of that provision. See Pet. 28-30. The decision did not "conclude[]" that those compensated according to Letter 551-10 "were not similarly situated to petitioners," Opp. 17; it pronounced "*hypothetical*" the employer's – undeniably real – practice of treating required law enforcement driving as compensable work. Nor would such a conclusion have been defensible: Petitioners were *identically* situated to those customarily paid, in those respects the employer deemed relevant: (1) they were covered by the FLSA, and (2) they drove work vehicles home, per employer requirements, for law enforcement response purposes. Whether or not the Section 4(b) issue recurs enough to warrant review on its own (Opp. 18) matters not, as it is presented here in a case that raises other, undeniably cert-worthy issues.

Conclusion

The petition should be granted.

Respectfully submitted,

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